No. [redacted] 147

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HAROLD B. WILLEY, Clerk

United States Court of Appeals

For the Second Circuit

No. 39—October Term, 1955

Docket No. 23580

—o—

ENNIS M. NICHOLS, individually and on behalf of other stockholders of LONG ISLAND LIGHTING COMPANY, similarly situated, and as Acting Chairman and member of the Committee of the Common Stockholders Committee of LONG ISLAND LIGHTING COMPANY, and COMMON STOCKHOLDERS COMMITTEE OF LONG ISLAND LIGHTING COMPANY,

Plaintiffs-Appellants,

against

HARRY A. ALKER, EDWARD F. BARRETT, DOUGALL C. FRASER, JOHN VANNEK, SAMUEL HOUSMAN, LEE P. SLACK, ETHEL W. BLAKESLEE, as Executrix of the Estate of CHARLES G. BLAKESLEE, Deceased, JAMES W. CARPENTER, WILLIAM ROGERS COE, ERROL W. DOEBLER, GEORGE LINK, JR., ROBERT G. OLMSTEAD, EDWARD J. CRUMMIE, HARRY C. HAGERTY, THOMAS P. BOOTH, ALBERT F. TEGEN, PERCIVAL E. JACKSON, FRANKLIN S. COONS, VINCENT T. MILES, WILLIAM C. LANGLEY, LAURENCE M. MARKS, DAVID K. KADANE and CHARLES P. ELBERT,

Defendants-Appellees.

—o—

PETITION OF ENNIS M. NICHOLS AND COMMITTEE OF THE COMMON STOCKHOLDERS OF LONG ISLAND LIGHTING COMPANY FOR REHEARING

Appellants and their counsel wish to record, at the outset of this Petition for Rehearing, their gratitude to this Court for its prolonged and careful consideration of their cause, which has not previously occurred in this litigation. Particularly, is this true as to the statement of facts contained in the Opinion at pages 726 and 727 and at pages 736 and 737. It is regrettable that this Court was

misinformed in its reference in the opinion (p. 743) to the "unsworn complaint" (See Appendix, p. 13). It was sworn to by the plaintiff, Nichols, in Washington, D. C.

While the Opinion is adverse to the plaintiffs, in its diversified conclusions, there are presented by it clear cut issues of law to which prior tribunals gave no heed, the chief of which is this:

> Does an expressly "limited participation", granted as a matter of grace, on petition, by an administrative agency of government in hearings before one of its employees, limited by no rules of evidence, allowing the admission of no proof, and hearing the testimony of no witnesses, satisfy the constitutional requirement for a jury trial on the common law issues of fraud and conspiracy?

On this point, we respectfully call attention to the Conclusion of our brief in the action brought by these same plaintiffs and counsel against the Long Island Lighting Company, referred to at page 728 of the instant opinion:

CONCLUSION (quoted from earlier brief)

As this appeal comes to this Court, it must be accepted as true for all purposes that upwards of 11,000 common stockholders of Long Island Lighting Company were defrauded by the defendant to the amount of $27,500,000 by the premeditated distortion and abuse of powers of an administrative agency of the United States government.

We are aware that this Court has closed its ears to our plea that the administrative proceeding before the SEC violated every principle and mandate laid down by the United States Supreme Court, in opinions by Chief Justice Hughes (*Morgan* v. *United States*, 298 U. S. 468, 304 U. S. 1; *Railroad Commission of California* v. *Pacific Gas and Electric Co.*, 302 U. S. 388); by Mr. Justice Brandeis (*St. Joseph*

Stockyards Co. v. *United States*, 298 U. S. 38, 73); and by Mr. Justice Cardozo (*Ohio Bell Tel. Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292)—and that we must accept the finality of this Court's decision sanctioning what took place before the SEC as *due process of law*. In this connection we refer to the study on administrative agencies prepared for the Commonwealth Fund in 1942 by Prof. Joseph B. Chamberlain and others, "*The Judicial Function in Administrative Agencies*", at pages 193-207.

We do not understand, however, that this Court has gone so far as to say that where an admitted fraud has been accomplished by "due process of law" in an administrative proceeding the injured persons have no remedy at law or in equity and, in effect, repudiated its own reasoning in the *Southern Pacific* case (244 Fed. 63).

Despite the fact of the now adjudicated conclusion that the proceedings before the SEC met the "minimal requirements" of a "fair trial", *non constat*, this can not deprive these appellants of their constitutional right to a *judicial* jury trial, upon showing, as they have by their undisputed and undenied complaint, that the administrative proceeding was admittedly initiated by the defendant and certain of its preferred stockholders for the purpose of obliterating the common stock equity of these appellants.

Even though it may be too late for this Court to do anything about it, in view of its earlier action, whether the proceedings before SEC met even the "minimal requirements of due process of law" may appear in a different light in view of the undenied allegations of the complaint now here.

Assuming, as we must, on this appeal, that the appellants can and will prove the allegations of their complaint, is it a good defense to the fraud alleged to say that it was accomplished in an administrative proceeding, over the violent protests of these appellants, where they were denied

the first elements of notice and a fair trial? By what authority has the Seventh Amendment to the Constitution been nullified by the Public Utility Holding Company Act and by what mandate has Rule 38 of the FRCP been abrogated?

With further prayer to the Court forbidden them under penalty of punishment for contempt in seeking a jury trial and refusing to go back before the very agency which permitted itself to be used as a tool in defrauding them, these appellants have but one remedy—the action here pleaded. It is their last stand against that tyranny from which the jury trial has long protected little people. (See Evatt, *Rum Rebellion,* page 169, alluded to by Chamberlain.)

Not alone in the interests of the appellants, but in the interest of the defendant and its present security holders, counsel could not bring themselves to follow the course mandated by the court below.

In proceedings under the PUHCA, there are necessarily no parties, as in common law litigation; every one of more than 11,000 small stockholders were, however, parties in interest and entitled to be heard. The appellant committee represented only between a fourth and a third of these individuals and its proxies and authorization went no further. It could make no agreement binding on the others and to have followed the procedure designated by the court below would literally have opened the possibility of endless and interminable legal proceedings, at the command of a single stockholder owning a single share.

In the action begun by the appellants, the litigation and all possibility of its continuance, beyond possible appeals, will end with a jury verdict on the single issue: *Was there a conspiracy to defraud the stockholders, was fraud practiced upon them and what, if any, damage did they suffer thereby?*

THE ORDERS OF THE DISTRICT COURT APPEALED FROM SHOULD BE VACATED AND SET ASIDE AND THE APPELLEES DIRECTED TO ANSWER THE COMPLAINT, AND THE ACTION TO PROCEED IN THE MANNER PRESCRIBED BY THE RULES.

(End of quotation from earlier brief)

Before proceeding further, it seems in order to deal with the only point on which the conflicting instant opinions appear to agree, namely, that contained in the last paragraph of Judge Frank's opinion. It seems to us clear that whether, in view of the dual employment of Kadane and his own admission of how a scheme was "invented" on the grounds of interstate commerce which would support the Commission's jurisdiction (Appendix 36), the SEC was fraudulently induced to exert jurisdiction is, at least, a question of fact on which these plaintiffs are entitled to a jury trial before which they may offer their full testimony and documented evidence.

Neither before the Securities & Exchange Commission nor in any court of law or equity have these plaintiffs been permitted to offer any documentary evidence, to produce a witness, to examine the defendants or any of them or even to compel the defendants to answer their sworn complaints, and this over a period of more than three years unbroken effort on their part to have their cause heard. Under these circumstances, it is difficult to understand the reasoning and authority behind the following concluding paragraph of the instant opinion:

> "Further, we think it proper to suggest that if the plaintiffs, unless they can show further justification than that shown in their present complaints and in those heretofore dismissed, should make yet another motion for re-opening the enforcement court, an order of denial be entered accompanied by an appropriate injunctive order directed *to counsel* (italics ours) as well as to the plaintiffs restraining further litigation

against the re-organized company and those individuals who directly or indirectly participated in its reorganization."

On this point, we respectfully call the Court's attention to the fact that, since the decision of the petition of April 1952, these plaintiffs have made no effort or attempt to re-open "the enforcement court" and have accepted its rulings as completely final and non-assailable, as we have attempted to make clear in affidavits, briefs and oral arguments on a dozen occasions. Moreover, if the complaint is defective, although found otherwise by Chief Judge Inch, its defects have not heretofore been pointed out and no right to amend has been or is granted these plaintiffs. Again on the point raised by the above quotation from the instant opinion, the question naturally arises just where and how are these plaintiffs "to show further justification than that shown in their present complaints".

None of the plaintiffs' sworn allegations has ever been denied, unless we have descended to the ridiculous practice of the Hitler German Courts, where *Schriftsatze*, consisting of anything counsel wanted to say were treated as evidence. Certainly statements in affidavits, briefs, letters of counsel do not count as evidence in any American court, and that is all this or any other court, sitting in this matter has had presented to it, with not even a pretense of confrontation or cross-examination, and the same is true, as far as the issues here involved are concerned of the hearings before the SEC. As indicated in an earlier brief, the plaintiffs are in possession of *documentary* evidence of the conspiracy alleged in the complaint, of the Company's misrepresentation of its earnings—this Court six years ago approved the LILCO reorganization "as fair and equitable" to these plaintiffs, on the finding of SEC that $3,500,000 a year was its maximum prospective earning power; in 1955 according to its own report, its earnings were $11,064,950

despite storm losses of $684,000—of its deceit as to its reserves and the "pay-off" of the conspirators.

These plaintiffs are here pleading for an opportunity to show the justification of their search for justice and are prepared "to show further justification than that shown in their present complaints" which pleaded only a portion of the salient resultant facts and not evidence, none of which has ever been sought or demanded by these defendants, through bill of particulars or examination before trial. The facts are *now* fully known by both sides of this litigation, but *no* opportunity has yet been afforded these plaintiffs to *prove* them.

In the last paragraph of the instant opinion is reiterated the grievous factual error of earlier opinions: the focal point, conceding, *as we can only for the sake of argument,* that the Court is correct in the law and legal philosophy it appears to have adopted.

In the last paragraph are contained these words:

> "For the allegations of fraud contained in the complaint in this action are substantially similar to those presented in 1952, and to the extent they are dissimilar or more complete, they were known to the plaintiffs and could have been presented at that time."

Factually and incontrovertibly, they were not known to these plaintiffs and could not by any legerdemain have become known to these plaintiffs, until two years after this Court had put its final imprimatur on the reorganization of LILCO. Moreover, we know of no decision or authority, even if the facts were other than as stated, which finally decides either by ESTOPPEL, STARE DECISIS OR RES JUDICATA the rights of litigants because something is *substantially similar* to something else, that had not then been revealed. This is the first time we have heard it argued that in law

if no where else in the universe that things nearly equal to the same thing are equal to each other.

Assuming the instant opinion sets forth the reasons for the affirmance and is not "slanted" or influenced, subconsciously, by the treatment heretofore accorded these plaintiffs in this Court, or because of the devastating, and as to certain defendants unjust, consequences of a reversal of the lower court, however egregious the errors there committed and which the instant opinion makes no effort to justify or sanction, it then becomes our duty to point out the most serious errors of the instant opinion.

Errors of the Instant Opinion

(a) In the procedural statement embodied at the outset of the printed opinion, it is said: "*Plaintiffs appeal from an order * * * dismissing the complaint on the ground of res judicata and striking it from the files as sham and false. Affirmed.*" Are the plaintiffs and their counsel to understand that the affirmance is based on the ground of *res judicata* and that the complaint is stricken from the files of the Court as *sham* and *false?*

(b) The opinion fails to perceive that the vice of the SEC assuming jurisdiction of the reorganization, lay in the fact that it flew in the face of a unanimous decision of this Court and was accomplished, as a part of a documentarily provable prior conspiracy by the voluntary submission by the Company, without consulting or informing its voting stockholders—a concealment consonant only with conspiracy.

(c) The instant opinion errs in its statement that in *Nichols* v. *LILCO*, 207 Fed. 2d 931, this Court affirmed the dismissal for the reason given by the trial judge, and also on the ground of *res judicata*. The opinion as printed does not support this statement.

The statement in the opinion, immediately following this also stultifies the later statement of the instant opinion that plaintiffs' charges have, in effect, been already tried, and confirms the statement made by plaintiffs' counsel in prior briefs and arguments, *viz.*, that there has never been even the semblance of a trial of the issues presented by the verified complaint, and nowhere or ever categorically denied:

> "Attempt by the present plaintiffs to compel SEC to receive testimony on the charges of fraud in the reorganization were dismissed by Judge Inch, following which we reaffirmed our previous holding on petition to amend."

On reconsideration, we think this statement is unfair both to Judge Inch and these plaintiffs, disparaging to Anglo-Saxon justice and reminiscent of the fulminations of Lord Coke in the trial of Sir Walter Raleigh, quoted verbatim in John M. Lane's "Story of the Law".

(d) The instant opinion refers to the plaintiffs' "device of shifting defendants". Such was not the attitude of this Court in the 25-year litigation of *Bogert* v. *Southern Pacific*, previously cited by the plaintiffs (244 Fed. 63).

(e) In the footnote on page 729 of the instant opinion reference is made to the subsequent reversal by this Court of its decision in *SEC* v. *Long Island Lighting Company*. It is difficult to see what bearing this has on the present appeal. When the reversal came in 1948, the conspiracy had accomplished its ends by illicit means of getting the reorganization before SEC, and had already reversed this Court.

(f) As to the statement of the instant opinion on page 733 that the granting of enforcement power to a Court under PUHCA "suggests strongly Congressional intent to immunize enforcement decrees from such attack". What-

ever the Congress intended or is supposed to have intended on this or any other occasion is not controlling as long as we have a Constitution.

(g) Of course it is unimportant, but counsel can not agree that the statement in *Petition of Blatchley* (157 F. 2d 894), referred to in a footnote on page 733 of the instant opinion, is clearly dictum. Further on this motion we omit any discussion or analysis of earlier decisions of this Court which appear flatly in conflict with the instant opinion, as for instance (148 F. 2d 253-254).

(h) On page 734 of the instant opinion the statement is made that the enforcing court on direct petition "to reopen its decree on the ground of fraud in its procurement could go no further than to vacate its decree (or perhaps so much of its decree as approved the treatment of common stock) and remand the plan to the SEC for further consideration". That is precisely what we pleaded for in 1952 and got nowhere.

(i) We do not understand the argument on pages 736 and 737 of the instant opinion, which states that its conclusion is so, "because it will necessarily involve litigation of matters within the sole competence of a specialized agency the SEC (does that mean the administration of justice?) and because it depends upon rights extinguished by the reorganization decree." Is this not to say that a District Attorney can not question a coroner's verdict of suicide, where subsequently discovered evidence shows a murder has been committed?

(j) But by all means the most baffling pronouncement of the instant opinion is that the plaintiffs are seeking to assert a right "extinguished by the (enforcement) decree." In the footnote on the same page occurs this statement:

> "The repeated allegations in this and prior proceedings of oppression of the common stockholders are

> made in such broad terms that, if believed, the proceedings confirming the plan would have denied the plaintiffs due process of law."

Believed by whom; is that not the function of a jury under Anglo-Saxon jurisprudence? Who can vest in the SEC or this Court the power to say that constitutional rights "shall cease and determine"?

Finally, we are unable to follow a statement of the instant opinion of this same page, 737; "the only damages asserted in the instant action are such as pertain to the plaintiffs as holders of the preorganization common stock." This, says the opinion, does not supply "an essential element of a tort action for fraud."

On this same page of the instant opinion occurs this conclusion of law:

> "We stated then that 'this court has jurisdiction to set aside its judgment if the judgment was induced by fraud upon the court practiced by a party to the litigation.' 197 Fed. 2d 709, 710. We adhere to that view."

The statement of that conclusion has now become academic in this litigation. The accompanying statement that the facts alleged in the petition do not show "that fraud was practiced upon the Commission, the District Court of this Court" was made at a time when it was utterly unknown and unknowable to this Court, the plaintiffs and their counsel what is contained in fifty typewritten pages of testimony and correspondence, described on page 8 of our brief on this appeal and contained in the report of the Division of Public Utilities of SEC under date of June 26, 1952. This Court wrote the opinion above quoted before this report of the SEC was even printed and in complete

ignorance of its contents and the events which, with strange reticulation, proved that the fraud was schemed in a conspiracy organized by these defendants, or some of them, as early as 1944 and consumated, unwittingly, with the blessing of this Court on June 1, 1950, two years before the proof of the conspiracy came to light.

We are not asking this Court to swallow the bitter pill of admitting that it was defrauded. What we are asking is that these plaintiffs be given a day in court and allowed to present their evidence and prove their case.

On further re-reading of the instant opinion and at the risk of being repetitive, we find other errors of fact or assumption, which we think justify a rehearing:

A. On page 731 of the opinion there appears a dissertation on the purpose and effect of the PUHCA and its exclusive jurisdiction as to reorganizations thereunder, which seems to imply that the Congress has created a new "administrative procedure before a specialized government agency" designed to replace the trial court in federal procedure. Be that as it may, the observation has no application to the instant appeal, since these plaintiffs and appellants have long since abandoned openly and completely, any attack or question on the finality of the SEC findings. We accept them as final as the laws of the Medes and Persians. Ours is not to reason why the decree below is *sui generis*, as the opinion states. In any event, it makes no difference here, or whether the law of New York or the United States, other than its Constitution, governs this case.

B. On page 734 of the main opinion the statement is made that this is a collateral attack on the reorganization decree, *with which Judge Frank's "concurring" opinion disagrees*, and that the parties "participating in the reorganization should have some protection from harassing

actions brought before various other tribunals". This appeal and the trial of the underlying action can not by any possibility affect any of the parties legitimately participating in the reorganization. If the plaintiffs were to be totally successful, it would not affect the Long Island Lighting Company or any of its security holders one farthing, and certainly it cannot be said that the instant action would "involve the litigation of matters within the sole competence of a specialized agency (the SEC) and because it depends upon rights extinguished by the reorganization decree," from which conclusion Judge Frank appears emphatically to dissent. In passing, not that it is now relevant, we do not believe that the statement of the opinion in the footnote on page 735 to the effect that the securities of Long Island, a completely intrastate company being distributed in interstate commerce, *per se*, gave the SEC jurisdiction, under the PUHCA, is to be taken literally, for were this so, the question arises why was it exempted until 1945 from the operations of this act and why, for instance, is the giant Consolidated Gas Company exempted and always has been and still is exempted. The conspiratorily inspired revocation of the exemption of the Long Island is an element of the proof of conspiracy here alleged, but of no such importance as to justify the prolonged discussion of the matter in the opinion, which seems almost to make this a determining factor in its decision. Had no such exemption existed and no surreptitious procurement of its revocation occurred, the plaintiffs' case would have been quite as strong; it is merely a non-essential bit of evidence, not vital to the cause of action.

Toward the end of the first phase of the sleight of hand activities of some of the defendant conspirators, the tricks were performed with great rapidity. Note these dates: *On March 26, 1945*, the petition for certiorari to the U. S. Supreme Court, by SEC was granted. This was to permit review of the affirmance by this Court of the District

Court's order holding that it had no power to restrain the Company from taking any further steps to consummate the 1944 plan.

On April 21, 1944, the SEC entered its opinion and order modifying the previous exemption of the Company.

On April 23, 1944, the Company hurriedly registered as a holding company, only two days later! Thus ended any question as to the SEC's jurisdiction.

The only point of Judge Frank's concurrence in the affirmance of this Court is that even without the filed consent of the Company to jurisdiction of SEC, on April 23, SEC had already obtained jurisdiction over it, two days before.

But as Judge Frank illustrates in his article in The Virginia Law Review, the hand of the "reorganization prestidigitator should not be ultimately found to be 'quicker than the Court's eye.' "

C. Turning again to a point we have already labored, the instant decision at page 738 makes the inaccurate statement:

> "But these very plaintiffs in 1952 sought to reopen the reorganization proceeding on the ground that SEC approval and court enforcement of the plan of reorganization by means of fraud."

This action is for fraud *and conspiracy*. In 1952, these plaintiffs had no knowledge of the conspiracy and as to the fraud, they confined their statement to "tantamount to fraud" in the representation as to earnings and depreciation reserve, as they were then not in possession of the complete proof, since revealed, of actual misrepresentation with full scienter on the part of some of these defendants.

D. The statement in the opinion at page 738, or its clear implication, that these plaintiffs sought to "bypass

the Commission" is contradicted by the earlier statement in the opinion (page 728) "Attempts by the present plaintiffs to compel SEC to receive testimony on the charges of fraud in the reorganization were dismissed by Judge Inch, following which we re-affirmed our previous holding on petition to amend" (211 F. 2d 392).

E. In his nominally concurring opinion Judge Frank has factually been misled by appellees' brief into the statement, unsupported by the record, "that the very fact which plaintiff now asserts, and findings on those facts were made adverse to plaintiffs. At page 10 of our brief on this appeal, we asked:

> "6. What support in fact, in truth or in the record is there for the statement filed in the court below, signed by David K. Kadane, as attorney for twelve of the defendants herein, and himself, pro se, dated November 22, 1954:
>
> > 'It thus appears that the material allegations of the complaint have either been passed on before and found to be without substance, or are demonstrably false.' "

This question has never been answered by the appellees, their counsel or Mr. Kadane. In view of the above statement of Judge Frank, we are compelled to ask that question again. We are likewise compelled to ask that question as to Judge Frank's statement—"Those statements of fact flatly denied as to these defendants, the allegations of the unsworn complaint."

The complaint was verified and has never been answered under oath or otherwise by any one of the defendants. Again Judge Frank has failed to observe that in the court below, the then attorney for these plaintiffs filed three affidavits, verified on November 12th, 15th and 16th, including in the affidavit of November 15th the exhibit (printed

at page 33 of the Appendix) setting forth David K. Kadane's statement of the circumstances of the "invention" of grounds of interstate commerce which would support the Commission's jurisdiction.

F. While apparently, both opinions discard without discussion the fallacy of the applicability of the doctrine of *res judicata*, upon which the opinion below rests, Judge Frank resorts to the doctrine of *stare decisis*. Without further enlightenment from the Court, we are unable to answer this argument, since we know on no case, in which the decision relies on the doctrine of *stare decisis*, where the issue is one of fact in a common law action, in which no evidence or proof has been offered and no trial has taken place before any judicial tribunal.

G. If the Court will turn to pages 726, 727, 736, 737 of the instant opinion where the allegations of the complaint are summarized, giving due consideration to the indisputable fact that the charges here made were totally unknown to these plaintiffs at the time the matter was before the Securities & Exchange Commission, also at the time this Court affirmed the enforcement order and even at the time plaintiffs moved this Court for a reconsideration of such action, except as far as they concern misrepresentations as to the Company's earnings and reserve (the facts concerning the earnings and reserve did not become known until the subsequent action of the Public Service Commission, and as to its earnings until the Company's annual report in 1953), it will be obvious that plaintiffs have had at no time, before the Commission or the District Court of this Court *any* opportunity to present documentary evidence in their possession or the testimony of a single witness as to the charges. Nevertheless, the instant opinion and decision forecloses to them every court of law and justice in the United States. Since the defendants have never in any pleading denied the sworn allegations, previously alluded to, the question inevitably arises, on

which we pray this Court's reconsideration: How these plaintiffs, directly or indirectly some 12,000 in number, are denied any trial or hearing of their complaints, unless it be that this Court has found the plaintiffs' allegations to be a pure fabrication, false and perjurous, although no such finding or intimation of such conclusion is contained in the instant opinion; unless it be in the following quotations from the instant opinion (p. 737):

> "The repeated allegations in this and prior proceedings of oppression of the common stockholders are made in such broad terms that, if believed, the proceedings confirming and enforcing the plan would have denied the plaintiffs due process of law"

and on page 735:

> "The only allegations of the complaint which venture any detail as to the alleged conspiracy make it quite clear that if the allegations be taken as true a fraud was perpetrated by the defendants upon the SEC and the Federal courts by the obtaining of the Commission approval of the reorganization."

Is not the question of their truth for a jury?

For reasons of compulsory economy, we submit herewith a single photostatic copy of Judge Frank's article in the Virginia Law Review (Vol. XIX (No. 6) referred to in opinion, labelled "concurring", because so much of it is apposite to the legal philosophy, which counsel have felt from the beginning of these proceedings should govern the consideration and determination of the plaintiffs' rights: Particularly in point are Judge Frank's characterization of the farcical character of many reorganizations and peculiarly appropriate in the LILCO reorganization are his observations as to "due process of law" at the bottom of page 553 and at the top of page 556, and the footnote thereto, as applied in this case to findings of the SEC and

the supine approval thereof by District Courts, of Judge Frank's characterization as sham, mockery and mummery of judicial sanction of plans of reorganization, with which the courts can not possibly be familiar to the point of understanding. It is to be remembered that the reorganization plan in the Long Island proceeding originated with and was the surreptitious plan of a management which had a less than 1% interest in the Company, which was not insolvent or threatened with any mortgage foreclosure of other creditor proceedings.

> "Cases involving large sums of money often have a curious effect on the reasoning processes of lawyers * * *" (p. 541). The correct proceeding and the judicial sale were considered in effect, merely extra shells under which to hide the pea, but the hand of the reorganization predigitator was not quicker that the court's eye.
>
> "Judicially recording a fraudulent conveyance cannot, of course, purge it of its sins" (pp. 541-542).

Conclusion

The instant opinion and decision followed the unbroken course of this litigation from the beginning. Perhaps, because of the seeming doctrine, since its inception, that the Securities & Exchange Commission "can do no wrong", this Court on the instant occasion and on prior occasions and similarly the District Court, without exception, have sought, in effect, to direct a verdict against these plaintiffs without permitting any oral testimony or documentary evidence to be offered in their behalf and, saying this with due deference, without any one of these tribunals, unless it be the present Court having any concept of the true inwardness of the fraud and conspiracy perpetrated, under the guise of due process of law, against these thousands of innocent and impecunious plaintiffs. We respectfully

submit that however individual members of these courts may have felt as to the merits of the plaintiffs' complaint, it is not constitutionally within the power of any one of them substantially to direct a verdict in favor of these defendants, which is indisputably the result of the instant opinions and decisions.

To borrow again from Judge Frank's article on "Some Realistic Reflections on Some Aspects of Corporate Reorganization", "We must not shut our eyes to any facts of common knowledge. All judicial proceedings must be adjusted to facts as they are", citing *In the Matter of Jones Hardwood Co.*, 10 F. T. C. D. at page 328. We earnestly entreat this Court to rehear this cause and adjust its determination to things as they are: That these plaintiffs and appellants have been swindled *in fact* by these defendants, or some of them, out of millions of dollars is "a proposition so plain that only the intelligent will dispute it", again borrowing from Judge Frank's article; to say that they have not been swindled *in law* and have no right to a day in court or to present their complaint to any tribunal in the country is the issue on which they now plead for a rehearing.

Respectfully submitted,

ENNIS M. NICHOLS and COMMITTEE OF COMMON STOCKHOLDERS OF LONG ISLAND LIGHTING COMPANY, *et al.*,

by HAROLD G. ARON,
Attorney for Petitioners.

Certificate of Merit

I hereby certify that I have prepared and read the foregoing petition; that I believe it to be true; that it is made in good faith and that it is not made for the purposes of delay.

HAROLD G. ARON,
Attorney for Petitioners.

No. [redacted] 147

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United States Court of Appeals

For the Second Circuit

ENNIS M. NICHOLS, individually and on behalf of other stockholders of LONG ISLAND LIGHTING COMPANY, similarly situated, and as Acting Chairman and member of the Committee of the Common Stockholders Committee of LONG ISLAND LIGHTING COMPANY, and Common Stockholders Committee of LONG ISLAND LIGHTING COMPANY,

Plaintiffs-Appellants,

against

HARRY A. ALKER, EDWARD F. BARRETT, DOUGALL C. FRASER, JOHN VANNEK, SAMUEL HOUSMAN, LEE P. SLACK, ETHEL W. BLAKESLEE, as Executrix of the Estate of CHARLES G. BLAKESLEE, Deceased, JAMES W. CARPENTER, WILLIAM ROGERS COE, ERROL W. DOEBLER, GEORGE LINK, JR., ROBERT G. OLMSTEAD, EDWARD J. CRUMMIE, HARRY C. HAGERTY, THOMAS P. BOOTH, ALBERT F. TEGEN, PERCIVAL E. JACKSON, FRANKLIN S. COONS, VINCENT T. MILES, WILLIAM C. LANGLEY, LAURENCE M. MARKS, DAVID K. KADANE and CHARLES P. ELBERT,

Defendants-Appellees.

APPENDIX TO APPELLANTS' BRIEF

Appeal From the District Court of the United States for the Eastern District of New York

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HAROLD G. ARON,
Attorney for Plaintiffs-Appellants,
Madison, Connecticut.

UNITED STATES COURT OF APPEALS FILED MAY 4 1955 A. DANIEL FUSARO CLERK

SUPERIOR DUPLICATING SERVICE, INC., 114 WORTH STREET, N. Y. 13, BEEKMAN 3-2320

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Date

Oct. 28-54—Complaint Filed—Summons Issued.

Oct. 28-54—Addtl. Summons Issued. For Defts' Vannek, Housman, Blakeslee, Link, Hagerty & Tegen.

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Nov. 10-54—Notice of Motion filed to strike complaint etc. (11/17/54).

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Nov. 15-54—Notice of Motion Filed To Strike Complaint etc. 11/17/54.

Nov. 17-54—Galston, J., Motions to Strike Complaint etc. Argued. Decision reserved. Exchange papers 11/22/54. All papers by 12/2/54. Affidavit of Percival E. Jackson filed. Affidavit of David M. Berenson filed.

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Dec. 14-54—By Galston, J., Decision on Motions to Strike Complaint. See Opinion on File. Settle Orders.

• • •

Dec. 23-54—By Galston, J., Order filed dismissing complaint and that complaint is stricken from files and denying motions to punish Pltff's Atty. without prejudice, etc.

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Jan. 12-55—Notice of Appeal Filed.

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Complaint

(Record Pages 18-29)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

The plaintiffs above named, by Berenson & Meisels, their attorneys, complaining of the defendants, respectfully allege:

1st: That the plaintiff, Ennis M. Nichols, is a citizen of the State of Virginia; that the defendants, or some of them, are citizens of the State of New York, and that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

2nd: That the plaintiff, Common Stockholders Committee of Long Island Lighting Company, at all the times hereinafter mentioned, was duly authorized by upwards of 2500 of the common stockholders of the predecessor of Long Island Lighting Company, a New York corporation, owners and holders of upwards of 750,000 of its shares of common stock, to act for and represent them and to act as agent, attorney, and transact for and in the name of said stockholders, any actions and proceedings relating to such stock and in any court, none of which authorizations have, to the best of plaintiffs' knowledge and belief, been revoked or withdrawn.

3rd: That the plaintiff, Ennis M. Nichols, was and at all the times herein mentioned, has been the owner and

registered holder of 775 shares of the said common stock of the predecessor corporation of Long Island Lighting Company and is a member and Acting Chairman of said Common Stockholders Committee and resides in Arlington, Virginia.

4th: Upon information and belief, that the Long Island Lighting Company was a utility operating company, with two operating utility subsidiaries, Queensborough Gas & Electric Company and Nassau & Suffolk Lighting Corporation.

5th: Upon information and belief, that Charles G. Blakeslee, one of the parties to the scheme and plan hereinafter alleged, died, leaving a last will and testament, which last will and testament has been duly admitted to probate in the Surrogate's Court of the County of New York, State of New York, and that on or about the 29th day of January, 1954, the defendant, Ethel W. Blakeslee was duly appointed by the Surrogate of said New York County of the State of New York, as Executrix of the Last Will and Testament of said Charles G. Blakeslee, deceased, and is still acting as such Executrix.

6th: That during the year 1944, the Long Island Lighting Company was a New York corporation, having its principal place of business at Mineola, Nassau County, Long Island, New York. That the said Long Island Lighting Company, as it was then constituted in the year 1944, was exempt from the provisions of the Public Utility Holding Company Act of 1935, as amended, hereinafter referred to as "PUHCA".

7th: That during the year 1944, the Long Island Lighting Company, as it was then constituted, and its subsidi-

aries, although financially solvent, had outstanding substantial dividend arrears on its issued and outstanding preferred stock which necessitated recapitalization.

8th: That on December 16, 1944, the Long Island Lighting Company filed in the office of the Secretary of State of the State of New York, with the approval of the Public Service Commission of the State of New York, a Certificate of Reduction of Capital for the purpose of effecting a revision of its capital and changing the rights and privileges of the holders of both its preferred and common stocks. That certificate, together with certain journal entries ordered by the Public Service Commission of the State of New York to be placed on the books of the company, provided, among other things, that (a) the par value of the outstanding 253,800 shares of preferred stock was to be reduced from $100.00 per share to $60.00 per share, and the liquidation, redemption and future dividend rights were thereafter to be determined upon such reduced par value; (b) the accumulated dividend arrears on the preferred stock at June 30, 1944, were to remain unaffected; (c) the outstanding 3,000,000 shares of comomn stock were to be cancelled and, in lieu thereof, the company was to issue 503,800 shares of new common stock to its preferred and common shareholders on the basis of one share of new common stock for each share of preferred stock and one share of new common stock for each twelve shares of common stock outstanding, and no dividends on the new common stock would be paid until all the arrears on the preferred stock were paid; and (d) the unearned surplus arising from the reduction in capital and from the elimination of paid-in premiums on preferred stock, together with the existing balance of unearned and earned surplus as at June 30, 1944, was to be used to increase the depreciation reserve by $6,000,000.00 and to provide $4,979,320.00 as a

special reserve for depreciation and for loss in value of investments in securities of associated companies.

9th: That at or about the time the said recapitalization of the Long Island Lighting Company and its subsidiaries was approved by the Public Service Commission of the State of New York, the defendant, David K. Kadane, an attorney and counsellor at law, was in the employ of the legal section of the Public Utility Division of the Securities And Exchange Commission.

10th: Upon information and belief, that at various times, during the years 1944 up to and including 1950, the decedent, Charles G. Blakeslee and the defendants, Harry A. Alker, Edward F. Barrett, Dougall C. Fraser, John Vannek, Samuel Housman, Lee P. Slack, Charles E. Elbert, James W. Carpenter, William Rogers Coe, Errol W. Doebler, George Link, Jr., Edward J. Crummie, Harry C. Hagerty, Albert F. Tegen and Laurence M. Marks, were officers and/or directors of the Long Island Lighting Company, the predecessor corporation of the present Long Island Lighting Company.

11th: Upon information and belief, the decedent, Charles G. Blakeslee, had been the general counsel for the Public Service Commission of the State of New York, and resigned before becoming a director and general counsel to the predecessor corporation of the Long Island Lighting Company.

12th: Upon information and belief, that at all the times hereinafter mentioned, the defendants, Edward F. Barrett, Robert G. Olmstead and Thomas P. Booth, were in charge of directing and controlling the financing and banking credits and the sale of securities of the Long Island

Lighting Company, both before and after its re-organization as hereinafter set forth.

13th: Upon information and belief, that the defendants, William C. Langley and Laurence M. Marks, were members of a preferred stockholders committee representing certain preferred stockholders of the predecessor corporation of the Long Island Lighting Company during the years 1944 and through 1950, inclusive, which committee was known as the "Langley Committee" and of which the defendant, William C. Langley, was chairman.

14th: That at all times prior to December 16, 1944, the common stockholders of the predecessor corporation of the Long Island Lighting Company, had the sole right to vote and the preferred stockholders of the predecessor corporation of the Long Island Lighting Company had no voting rights.

15th: Upon information and belief, that by virtue of the various offices held, the defendants herein were fully familiar with the financial situation of the Long Island Lighting Company, the predecessor corporation of the present Long Island Lighting Company, and had control and/or access to the books, ledgers, documents, records, and reports of the said Long Island Lighting Company and its subsidiaries, and by reason thereof, were or should have been at all the times hereinafter mentioned, fully cognizant of the financial and business condition of the said predecessor corporation to the present Long Island Lighting Company.

16th: Upon information and belief, that after the Long Island Lighting Company, the predecessor to the present company, had filed its plan of recapitalization as afore-

mentioned, the same became final and binding upon the filing of the certificate of reduction of capital stock in the office of the Secretary of State of the State of New York.

17th: Upon information and belief, that certain of the preferred stockholders of the predecessor corporation of the Long Island Lighting Company through the so called Langley Committee by the defendant, Percival E. Jackson, entered into negotiations with the defendant, David K. Kadane, who, at that time, was an attorney employed by the Public Utility Division of the Securities And Exchange Commission for the purpose of employing, or inventing, some means or methods of undoing the recapitalization of the predecessor corporation of the Long Island Lighting Company and reorganizing said company without the knowledge or consent of the plaintiff and those similarly situated.

18th: Upon information and belief, that in pursuance of a scheme and plan, the defendant directors of the predecessor Long Island Lighting Company, through their position in and domination of said company, caused the said predecessor corporation of the Long Island Lighting Company to surrender its exemption under the "PUHCA" and submitted the predecessor corporation of the Long Island Lighting Company to the jurisdiction of the Securities And Exchange Commission without the knowledge or consent of the common stockholders and in violation of their duties as directors.

19th: Upon information and belief, that the same was accomplished through the connivance and co-operation of the defendants and each of them, acting in concert with the defendant, David K. Kadane, whereby proceedings were instituted by the Securities And Exchange Commission in

the United States District Court for the Eastern District of New York, and temporary court stays were sought and obtained thus preventing the recapitalization of the predecessor corporation of the Long Island Lighting Company to become operative.

20th: Upon information and belief, that the defendant directors of the predecessor corporation of the Long Island Lighting Company wilfully and intentionally withheld notice or information of such acts from the common stockholders of the predecessor corporation and deliberately failed to call any meeting of the common stockholders to act or pass thereon.

21st: Upon information and belief, that thereafter and on or about October 25, 1945, the defendants, in furtherance of said scheme and plan, caused the Long Island Lighting Company to register as a holding company under the "PUHCA" thereby waiving its proper exemption therefrom and by reason thereof, defeating, denying and blocking all other and further proceedings in the courts and by the Public Service Commission of the State of New York, that could or should have been brought on behalf of the common stockholders in enforcement or protection of their rights under the 1944 recapitalization plan.

22nd: Upon information and belief, that some time between the years 1944 and 1950, the defendants, individually, jointly and severally herein conspired together and maliciously entered into a scheme to defeat the vested rights of the plaintiffs and those similarly situated in the 1944 recapitalization plan aforementioned, and to destroy the right of the plaintiffs and the stockholders similarly situated to receive 49.62% of the common stock and the voting rights pertinent thereto of the Long Island Lighting

Company as recapitalized, and further to effect the dissolution of the predecessor company without the knowledge and consent of the plaintiff and those similarly situated.

23rd: Upon information and belief, that the acts and things herein alleged were done by all of the defendants or by one or more of them, as steps in and in pursuance of such conspiracy, for the purpose of destroying the rights of the plaintiffs and those other stockholders similarly situated as hereinafter alleged.

24th: Upon information and belief, that in furtherance of the said scheme and conspiracy, the defendants induced the Securities And Exchange Commission, for whom the defendant, David K. Kadane, was then acting as special counsel, to institute proceedings in the Federal Courts to enjoin enforcement of the 1944 recapitalization approved by the Public Service Commission of the State of New York.

25th: Upon information and belief, that in furtherance of the said scheme and conspiracy, the predecessor corporation of the Long Island Lighting Company having waived its exemption as aforesaid, was induced by the defendants to file a plan of reorganization before the Securities And Exchange Commission whereby and wherein plaintiffs and all other common stockholders similarly situated were to receive no stock interest or other participation in the reorganized company, which plan was later amended to grant to plaintiffs and other common stockholders similarly situated, 5.7% of the common stock of the reorganized company.

26th: Upon information and belief, that thereafter, the aforementioned amended plan of reorganization was approved by the Securities And Exchange Commission before whom, during hearings on said amended plan, the defend-

ant, David K. Kadane acted as counsel for the Long Island Lighting Company.

27th: Upon information and belief, that in furtherance of the said scheme and conspiracy, the defendants, or some of them, intentionally and wrongfully concealed from the United States Circuit Court of Appeals, Second Circuit, the true earnings of the predecessor corporation to the Long Island Lighting Company in connection with approval of the aforementioned amended plan of reorganization, in that they failed to disclose that the actual earnings of the company were then far in excess of the maximum estimated earnings upon which approval of the said amended plan was predicated.

28th: Upon information and belief, that in furtherance of the said scheme and conspiracy, in the hearings upon the aforementioned amended plan, the defendants, or some of them, knowingly misrepresented the true situation as to the depreciation reserve of the Long Island Lighting Company, and concealed from the Securities And Exchange Commission and the courts, that the Long Island Lighting Company had previously initiated proceedings before the Public Service Commission of the State of New York, to procure a reduction in the said company's depreciation reserve; that said proceedings were then pending, and had reached a point where the granting thereof was almost a mathematical certainty.

29th: Upon information and belief, that in furtherance of the said scheme and conspiracy in the hearings upon the aforementioned amended plan before the Securities And Exchange Commission and the courts, the defendants, or some of them, knowingly misrepresented the effect upon the prospective earnings of the Long Island Lighting Com-

pany of the introduction and use of natural gas by the Long Island System.

30th: Upon information and belief, that in furtherance of the said scheme and conspiracy, the defendants, or some of them, induced the predecessor corporation to the Long Island Lighting Company to fail and refuse to call and hold any annual meeting of the plaintiffs and those similarly situated as common stockholders of the company after 1944 and induced and caused the Securities And Exchange Commission to delay its approval of the proxy material necessary to the holding of a special meeting of stockholders to elect directors which had been duly called under the Laws of the State of New York, until after the Securities And Exchange Commission had handed down its findings and opinions on the amended plan and immediately thereafter procured an injunction which prohibited the holding of said meeting and any further action on the part of the plaintiffs and those similarly situated.

31st: Upon information and belief, that in furtherance of the said scheme and conspiracy, the defendants, or some of them, during the hearings before the Securities And Exchange Commission, caused the board of directors of the Long Island Lighting Company to accept on behalf of said company the offer of the Consolidated Edison Company for all of the assets of the Long Island Lighting System to pay in its debentures a price less than one half of then true value.

32nd: Upon information and belief, that in furtherance of the said scheme and conspiracy, the defendants or some of them, induced the defendant, David K. Kadane, to resign as an attorney for the Securities And Exchange Commission in charge of the reorganization proceedings of

the Long Island Lighting Company, and to thereafter become attorney and later general counsel for the Long Island Lighting Company in charge on its behalf of the same reorganization proceedings.

33rd: Upon information and belief, that in furtherance of the said scheme and conspiracy, at the hearings before the Securities And Exchange Commission, as aforesaid, the defendants, Charles E. Elbert, Edward F. Barrett, Robert G. Olmstead and Thomas P. Booth, knowingly gave misleading testimony before that body as to the financial situation and earning prospects of the company.

34th: That by reason of the aforementioned scheme and plan and the acts of the defendants, as hereinabove set forth, the Long Island Lighting Company was reorganized as presently constituted, through a determination of the Securities And Exchange Commission, and pursuant to an enforceemnt order of the United States District Court, Eastern District of New York.

35th: That as a result of the aforesaid scheme and conspiracy, and the acts perpetrated thereunder, plaintiff and those similarly situated, received in exchange for the three million shares of common stock of the predecessor Long Island Lighting Company then outstanding, 6% of the shares of the common stock of the new Long Island Lighting Company instead and in place of the 49.62% of the new common stock to which they were entitled pursuant to the certificate of reduction of capital stock filed, as aforementioned, with the Secretary of State of the State of New York.

36th: That as a result of the aforesaid scheme and conspiracy and the acts done thereunder, the plaintiffs and those similarly situated, were injured and sustained dam-

ages amounting to the sum of $50,000,000.00, with interest thereon from the effective date of the aforementioned reorganization.

WHEREFORE, plaintiffs demand judgment against the defendants and each of them, for the sum of $50,000,000.00, together with interest from October 24, 1950, and the costs and disbursements of this action.

BERENSON & MEISELS,
By DAVID M. BERENSON,
A Member of the Firm,
Attorneys for Plaintiffs,
Office & P. O. Address,
120 Broadway.
Borough of Manhattan,
City of New York.

(Verified.)

Notice of Motion of Defendant, Jackson, to Strike Complaint, etc.

(Record Pages 43-44)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavits of Percival E. Jackson, verified November 8, 1954, and of David K. Kadane, verified November 9, 1954, and upon all the papers and proceedings heretofore had herein, the

Notice of Motion of Defendant, Jackson, to Strike Complaint, etc.

undersigned will move this Court at a Motion Part of the United States Court House Building, Washington and Johnson Streets, Borough of Brooklyn, County of Kings, City and State of New York, on the 17th day of November, 1954, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order pursuant to Rule 11 of the Rules of Civil Procedure striking the complaint from the files of this Court, as sham and false, and subjecting counsel for plaintiff to appropriate disciplinary action and for such other and further relief as to this Court may seem just and proper.

Dated: New York, November 10, 1954.

Yours, etc.,

PERCIVAL E. JACKSON,
Defendant Pro Se,
Office & P. O. Address,
68 William Street,
Borough of Manhattan,
New York City.

To:

BERENSON & MEISELS, Esqs.,
Attorneys for Plaintiffs,
120 Broadway,
Borough of Manhattan,
City of New York.

Affidavit of Percival E. Jackson, Read in Support of Motion of Defendant, Jackson, to Strike Complaint, etc.

(Record Pages 45-54)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PERCIVAL E. JACKSON, being duly sworn, deposes and says:

I am one of the defendants in the above-entitled action and make this application, pursuant to Rule 11 of the Rules of Civil Procedure:

(1) to strike out, as sham and false, the complaint herein; and

(2) to subject to appropriate disciplinary action David M. Berenson, a member of the firm of Berenson & Meisels the attorneys for the plaintiffs who signs said pleading upon the ground that he had no reasonable knowledge, information or belief that there is good ground to support said pleading.

For the latter purpose, I will hereafter demonstrate that the complaint which charges me and other defendants with what is not only a breach of professional responsibilities but what is, or is tantamount to, a crime, was recklessly

and ignorantly drawn and framed, not only without information justifying a belief in its averments respecting me, but without any effort to ascertain the readily available facts of record which, beyond peradventure, deny such averments and charges, and that it was signed by the attorney after notice by me to him of the falsity of its allegations and of the obligations imposed upon him by Rule 11.

Respecting the falsity of the allegations:

Analysis of the complaint

filed on behalf of a former common stockholder of the predecessor of the present reorganized Long Island Lighting Company

against three groups of persons:

(1) persons alleged to have been officers of such predecessor company (Complaint Par. 10th);

(2) persons alleged to have been directors of such predecessor company (Complaint Par. 10th); and

(3) myself, as counsel, William C. Langley and Laurence M. Marks, members of a preferred stockholders committee of the predecessor company (Complaint Pars. 13th, 17th).

reveals the following as the gravamen of the alleged cause of action:

(1) that the predecessor company was in default of payment of dividends (id. Par. 7th);

(2) that it effected reorganization under State law in 1944 (id. Par. 8th);

(3) that before such reorganization became effective, the three groups of defendants mentioned above

conspired with the defendant David Kadane, then an attorney in the employ of the Securities and Exchange Commission, so that the SEC might take jurisdiction of the predecessor company and reorganize it, thereby defeating and making ineffectual the previous reorganization under State law (id. Pars. 9th, 17th-25th);

(4) that thereafter, the defendants, with said Kadane, now no longer with the Commission but acting as attorney for the predecessor company, suppressed and falsified evidence, among other things, whereby the SEC and this Court approved a plan of reorganization which superseded the State reorganization, as a result of which the plaintiff, and other common stockholders of the predecessor corporation, unnamed and not parties to the action, suffered a loss of no less than $50,000,000 (id. Pars. 26th-35th).

For my purposes, branding this tale a figment of the imagination of the plaintiff, recklessly put into the form of a complaint by lawyers, mindless of the obligations that attach to the privilege of invoking the judicial power, though forcibly brought to their attention by Rule 11, I need not call the attention of the Court to the fact that this imaginary contention of the plaintiff was brought to the attention of this Court and the Court of Appeals of this Circuit on six separate occasions and summarily rejected. (*In re Long Island Lighting Co.*, 89 F. Supp. 513 aff. sub nom. *Common Stockholders Committee* v. *Securities and Exchange Commission*, 183 F. 2d 45; cert. den. 340 U. S. 834; *In re Long Island Lighting Co.*, 197 F. 2d 709; *Nichols* v. *Long Island Lighting Co.*, 207 F. 2d 931, 211 F. 2d 392.) That fact becomes important later, however, in considering

the degree of recklessness of which these lawyers have been guilty and in assessing their punishment.

For my present purpose, i. e., of demonstrating beyond any possible argument that the public records demonstrate that it was impossible that I, or Messrs. Langley or Marks, could have participated in the conspiracy alleged in the complaint, it suffices to point out:

> (1) that the alleged conspiracy with Mr. Kadane is claimed (and, of course, necessarily so) to have been effected by me and the Committee I represent while Mr. Kadane was in the employ of the Commission (Complaint, Par. 17th);
>
> (2) that the records of the Commission reveal, what is the undeniable fact (and for this I attach an affidavit of Mr. Kadane since my desire to make this motion and strike this complaint without delay does not permit me to send to Washington for a Commission certification)—Mr. Kadane permanently severed connection with the Commission in March of 1946 and never thereafter was employed by the Commission; and
>
> (3) Our Committee did not come into existence until March 25, 1948, nor was I even consulted by any preferred stockholder until August 1947, and consequently, neither I nor any member of our Committee had or could have had any interest in or contact with the situation while Mr. Kadane was employed by the Commission.

In documenting my denial that I or any member of our Committee participated, or could have participated in any conspiracy to supersede the state reorganization with reorganization under the Public Utility Holding Company Act,

I might further point out that all the acts alleged in the complaint occurred between 1944 and 1950 (see Complaint Par. 10th). This was necessarily so, since the SEC reorganization was finally consummated on October 24, 1950 and anything done to effect it had to be done before the date of final consummation.

Again the record reveals that during this preceding period, from the date I and my Committee entered the proceeding, to wit, March 25, 1948 until November 16, 1949, the date of approval of the reorganization by the SEC, our Committee opposed the predecessor company and its plan and necessarily and actually neither I nor any member of our Committee had any connection with the predecessor company—unless being its opponent is a connection—and therefore none of us was in any position to influence the predecessor company or its policies. It was only when the plan, approved by the SEC, came before this Court for approval and enforcement, that our Committee decided it would be futile to delay the proceedings further by opposition and we went along with it. And it was only after the plan had been finally approved by this Court and the Court of Appeals that, pursuant to the provisions of the plan, a new Board of Directors was elected by the stockholders and Mr. Stack, who was a member of our Committee, and I became members of the Board of the *successor* company. This was on January 31, 1951. Previously neither of us had been a director of the predecessor company, or of any of its subsidiaries, or otherwise connected with it or them.

All of the foregoing could have been learned by the lawyers from the records of the SEC or from Moody's Manuals. The latter, published annually, give the names of directors of corporations and reveal that those named by the plaintiff's attorneys in Par. 10th of the complaint

as having been directors of the predecessor company between 1944 and 1950 (an essential if they were to have participated in the conspiracy alleged in the complaint), Dougall C. Fraser, John Vanneck (carelessly sued herein as "Vannek"), Samuel Hausman (carelessly sued herein as "Housman"), Lee P. Stack (carelessly sued herein as "Slack") and Albert F. Tegen had no connection with the predecessor company and only became connected with the situation as directors of the *successor company* (which came into being *after* the reorganization plan was consummated) on January 31, 1951.

In a word, the falsity of these allegations is demonstrated, beyond argument, by dates alone, as to myself, and the defendants Langley, Marks and Stack, since (1) the Committee did not come into existence and could not have conspired with Kadane, an employee of the Commission, until after he had severed his connection with the Commission; (2) none of us could have conspired to effect the Federal plan since we opposed it; and (3) none of us could have influenced the predecessor company or have acted for it since none of us had any connection with it, except as an opponent, until after the plan was approved by this Court.

Similarly, dates alone unqualifiedly deny any connection with the predecessor company by the Defendants Fraser, Vanneck, Hausman, Stack and Tegen who the public records reveal were never connected with the predecessor company, but only came into the situation when elected directors of the successor company in January 1951, after the reorganization became effective.

In thus demonstrating the falsity of the charges, I demonstrate the recklessness of the lawyers. It is impossible to conceive that any reputable member of the Bar, told a story of intricate legal proceedings by a prospective

lay client who had been represented in the proceedings by numerous counsel, who were no longer acting for him, would not go to the Court or other public records to get the facts before starting a suit against reputable members of the community charging them with participation in a conspiracy that smacks of, if indeed it does not constitute, a crime. It is impossible to conceive that any lawyer of intelligence, having been careless enough to draw and file such a complaint, after having been informed by an affidavit of another member of the bar that the charges were demonstrably false and having been thereby required to sign the complaint and having further been thereby apprised of Rule 11 and its prohibition and of counsel's intention to invoke its disciplinary powers, would sign such a complaint without making inquiry or the necessary investigation designed to satisfy the requirements of the rule.

In this connection, it is to be noted that I asked Mr. Tarlau of my office personally to serve the notice of motion based on my affidavit requiring signature of counsel under Rule 11, so that he might ask for the lawyer in charge and orally put the situation before him in order that he might make his own investigation and avoid these further proceedings. Mr. Tarlau advises me that in reply to his request he was told that the lawyer "was too busy to see him".

Under these circumstances, I feel that I have discharged my full duty, if any I had, before asking that proceedings be instituted to bring these lawyers before the Bar of this Court and subject them to appropriate punishment for their violation of the rules of conduct embodied in Rule 11. The misdemeanor of these men is grievous. Every one of these defendants is a man of repute and substance in the community, many have well-known names. The basic charges have been discredited half a dozen times and their repetition is barratrous. The lawyers who were willing to

sponsor them in the heat of battle do not sponsor them now. New lawyers are brought in who had no connection with the prior proceedings and obviously know nothing about them except what they have been told by a litigant embittered by defeat whose imagination substitutes for fact. In the face of all this, these lawyers draw a complaint embodying allegations rendered false by public records to which they take no obvious recourse. When by solemn affidavit, their attention is called to their delinquency and its possible consequence, they cavalierly seek to shrug it off. Their contempt, not only of their professional obligations, but of the power of the Court, is obvious.

WHEREFORE, I pray that the complaint be stricken from the files of this Court as sham and false and counsel for plaintiff subjected to appropriate disciplinary action and for such other and further relief as to this Court may seem just and proper.

PERCIVAL E. JACKSON.

(Sworn to November 8, 1954.)

Affidavit of David K. Kadane, Read in Support of Motion of Defendant, Jackson, to Strike Complaint, etc.

(Record Pages 55-56)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

DAVID K. KADANE, being duly sworn, deposes and says:

Prior to August 3, 1945 I was employed as Special Counsel to the Public Utilities Division of the Securities and Exchange Commission. On August 3, 1945 I was appointed Assistant Director, and thereafter had no responsibility respecting the Long Island Lighting Company's matters before the Securities and Exchange Commission.

On March 1, 1946 I left the Securities and Exchange Commission, then in Philadelphia, and was employed as assistant to the National Housing Expediter in Washington, D. C. On March 29 this transfer was made permanent.

On or about August 1, 1946 I was advised by the Commission that it would not be considered improper for me to accept employment with Long Island Lighting Company. It was understood, either expressly or impliedly, that I would not work on a reorganization plan which had been filed with the Commission during my employment with the Commission.

Affidavit of David M. Berenson, Read in Opposition to Motion of Defendant, Jackson, to Strike Complaint, etc.

In September, 1946 I was employed by Long Island Lighting Company.

On September 24, 1947 the reorganization plan referred to above was disapproved by the New York Public Service Commission on the ground, among others, that the proposed capital structure was improper. This required the development of a new plan on a drastically different basis.

On or about October 6, 1947, in answer to a request of Long Island Lighting Company, the Securities and Exchange Commission stated that it would not be regarded as improper for me to work on the new reorganization plan.

DAVID K. KADANE.

(Sworn to November 9, 1954.)

Affidavit of David M. Berenson, Read in Opposition to Motion of Defendant, Jackson, to Strike Complaint, etc.

(Record Pages 69-78)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DAVID M. BERENSON, being duly sworn, deposes and says:

I am a member of the firm of Berenson & Meisels, the attorneys for the plaintiffs herein, and make this affidavit

in opposition to the application to strike the complaint and to subject deponent to disciplinary action.

At the outset, deponent respectfully shows that Percival E. Jackson, the moving defendant herein, does not anywhere in his moving papers state, allege on belief, or infer that your affiant lawfully violated or intended in any way to defeat the purpose of Rule 11 of the Rules of Civil Procedure.

On the contrary, deponent, a member of the bar in good standing, stated under oath, without equivocation or reservation, that the within action was brought in good faith, and that he believed plaintiffs' cause to be meritorious. The record herein discloses deponent, on being apprised of a technical failure to comply with Rule 11, immediately prepared and caused to be served upon the moving party defendant, his affidavit setting forth a willingness at all times to sign the complaint as prescribed by the Rule.

Deponent's firm was retained by plaintiffs in the above matter at the suggestion of Harold G. Aron, Esq., General Counsel to plaintiffs, who is not disposed to act as trial counsel for the reason he expects to be a witness at the trial herein.

It is further submitted, that for more than six months prior to the filing of the complaint, your deponent's firm has examined the records, briefs and memoranda in prior litigation involving the within situation. These records have been examined by deponent. Also, there was carried on, under deponent's supervision, careful and intensive investigation of the facts involved herein, some of which facts went back as far as 1942.

As a result of the foregoing, the complaint herein was drafted and filed, which complaint represents the result of many hours of work, investigation and preparation, predicated on the facts as disclosed by the records in previous proceedings which support, in deponent's opinion,

the allegations of the complaint involving all the defendants mentioned therein.

Since Rule 11 of the Rules of Civil Procedure is not designed to test the sufficiency of the complaint or to act as a motion for summary judgment, and further, since the moving papers relate only to an attempt to castigate your deponent and to prove impossibility in fact for Jackson to be involved in the alleged conspiracy, deponent directs the remainder hereof to the assertions made by the moving party defendant.

At the outset, for purposes of settling the issues at bar, it is respectfully submitted that the moving party defendant, Jackson, has failed to fully or fairly state the gravemen alleged in the complaint.

On page "3" of Jackson's affidavit, there is stated, as a purported summary of the complaint, "that before such reorganization became effective, the three groups of defendants mentioned above conspired with the defendant David Kadane, then an attorney in the employ of the Securities and Exchange Commission * * * ".

It is respectfully submitted, even a cursory examination of the complaint clearly indicates that this allegation relates to a step in the conspiracy for the purpose of *undoing* the New York State Recapitalization which was final and binding. Such distortion of the issue obviously changes both the substance of the complaint and the time involved. For purposes herein, Jackson uses this distortion to place the alleged meeting at sometime before 1944, and not as is alleged in the complaint, after 1944.

So too, on page "4" of Jackson's affidavit, it is stated without qualification of any kind, that plaintiffs' contentions were brought to the attention of the courts on six separate occasions and were summarily rejected. This is not so.

Affidavit of David M. Berenson, Read in Opposition to Motion of Defendant, Jackson, to Strike Complaint, etc.

The subject matter alleged in the instant complaint has never been passed on by this or any other court. An examination of the reported decisions will show, at the very outset, a difference in parties defendant, the party defendant in those cases cited was the Long Island Lighting Company and further, that said cases turned on the question of res judicata despite the fact that the evidence of the fraud and conspiracy herein alleged was not discovered by plaintiffs until long after the close of the matter by the S.E.C., and the enforcement order of this court.

It is abundantly clear, the defendants herein never having been made parties to any action and never having been called to account for the acts alleged in the complaint cannot now interpose the defense res judicata.

Based on his distorted summary of the complaint, the moving party in the main, attempts to demonstrate the supposed falsity of the complaint by dates appearing in public records.

First, Jackson states, on pages "5" and "6" of his affidavit, that since the "Langley Committee" did not come into being until March 25, 1948, he could not have acted on its behalf before such date. Again, on page "5" of his affidavit, substantially confirmed in Kadane's affidavit, that since Kadane permanently severed his connection with the Commission in March of 1946, the negotiations alleged in paragraph "17th" of the complaint could not have taken place.

Again, on page "5" of his affidavit, Jackson, in fact, goes even further and states: " • • • and consequently, neither I nor any member of our Committee had or could have any interest in or contact with the situation while Mr. Kadane was employed by the Commission".

It is respectfully submitted that the foregoing statements constitute a complete falsehood and are contrary to public record.

Affidavit of David M. Berenson, Read in Opposition to Motion of Defendant, Jackson, to Strike Complaint, etc.

Attached hereto and marked Exhibits "A 1-5", and made part hereof, are photostatic copies of the cover page and other pertinent pages of RECOMMENDATION FOR FEES AND SUPPORTING BRIEF OF LONG ISLAND LIGHTING COMPANY, dated June 8, 1951, submitted to the S.E.C., and over the signature of the defendant David K. Kadane.

Attention is respectfully directed to Exhibit "A 4", where it is shown by reference to stenographer's minutes *that Jackson testified on cross-examination he was in touch with the situation herein involved as early as 1941.*

Aside from the obvious, deponent feels the Court should seek from the moving party defendant, Jackson, an answer to the following query, to wit: If it is true, as stated on page "5" of the affidavit that he, Jackson, was never "even consulted by any preferred stockholder until August, 1947", then what was the occasion for his approach to this situation in 1941?

Perhaps the answer is intimated by defendant Kadane, in Exhibit "A 3" where it appears the "Gray Committee" of preferred stockholders which actively participated in the 1944 recapitalization, was being thwarted because of the "Langley Committee's" control of over 50% of the same class of stock.

It is further respectfully submitted, the statement made in both the Jackson and Kadane affidavits, which are the moving papers herein, that Kadane permanently severed his connection with the S.E.C. on March 29, 1946, is a complete falsehood.

Attached hereto and marked Exhibit "B", and made part hereof, is a photostatic copy of a letter inquiring of, and responded to by the S.E.C. through its director of personnel. This shows not only had Kadane not permanently severed his connection with the S.E.C. on March 29, 1946, but that he was still an employee of said Commis-

sion when, as he states under oath, he entered the employ of the Long Island Lighting Company.

Parenthetically, in this connection, it is interesting to note in Kadane's affidavit a reference to two separate instances upon which the opinion of the Commission was sought concerning his conduct. In each instance, Kadane avers the Commission stated his conduct would not be regarded as improper, yet and despite the fact that that very conduct on his part is here in question, he deems such opinions of the Commission of so little import as to fail to attach copies thereof to his affidavit or even make such definite reference to the same as to afford an opportunity of investigation.

It is abundantly clear, from the foregoing, that Jackson's contention, to wit: he could not have participated in the conspiracy alleged, is pure fiction.

It is further respectfully submitted, that nowhere in the moving papers herein is stated, in connection with this situation, either:

a) a simple, straightforward denial of the negotiations alleged in the complaint; or

b) the date when, place where, and circumstances under which the defendants Jackson and Kadane first met.

Again, it is respectfully submitted, the moving party has carefully and astutely avoided a simple, straightforward denial in relation to himself in respect to the other allegations of the complaint, nor can it be contended that any of the defendants named herein made any such denial in any prior proceeding.

On the contrary, the allegations contained in the complaint, and your deponent, are attacked by innuendo and

inference which, as shown herein, fail to set forth known and documented facts.

The second of the moving party's contentions, i.e., he could have conspired since he opposed the federal plan, is a perfect non sequitur. Completely overlooked by Jackson in this contention, is the fact that plaintiffs' allegation concerns THE UNDOING OF THE NEW YORK STATE RECAPITALIZATION WHICH HAD BECOME FINAL AND BINDING AND NOT THE FEDERAL PLAN.

Even were this not the fact, mere opposition to a plan does not preclude a party from being a principal in a conspiracy. An examination of the opposition urged by Jackson before the S.E.C. shows that such opposition could not militate against his being a principal party to the alleged conspiracy which was designed to deprive plaintiffs and those similarly situated of almost 50% of the equity ownership in the Long Island Lighting Company which was theirs by virtue of the New York State Recapitalization.

The third of the moving party's contentions, i.e., he could not have influenced the predecessor company or acted for it, except as opponent, since he had no connection with the same until 1951, is likewise a non sequitur for the same reasons as are urged hereinabove.

Similarly, the mere fact that a party appeared officially in the record as attorney for some of the preferred stockholders, does not necessarily preclude him from participation in some or all of the steps in a conspiracy as alleged in the complaint herein.

Further, it is respectfully submitted that those allegations concerning the inducement of the predecessor company relate to "defendants or some of them".

Since, from all of the foregoing, it must appear deponent has some mastery of the intricate facts involved in almost ten years of continuous and contested litigation, that such

mastery could only have come as a result of intensive inquiry and investigation.

Accordingly, it is not unnatural for deponent to believe Jackson's aspersions upon his professional conduct should be censured for they are without warrant or foundation, and are based, as shown above, upon premises which are shown to be untrue by public record.

In this regard, deponent should like to advise the court that his investigation of the within situation disclosed the within attempt to slur and slander deponent and his firm, is but another of repeated attempts on the part of the Long Island Lighting Company to seek to discipline or punish for contempt counsel (other than deponent) who oppose it in an effort, in deponent's opinion, to intimidate or at least discourage attorneys in the performance of their sworn duty to seek justice for their clients.

Likewise, your deponent cannot allow to pass, unopposed, Jackson's alleged attempt to call to the attention of deponent his so called "delinquency".

Actually, Mr. Tarlau, of Jackson's office, did call at my office, but whether through failure to follow instructions, or design, he did not, as is stated, ask to confer with deponent or his partner concerning the matter at bar. If so, he would have been seen. In which event deponent might have been spared his unpleasant obligation herein of showing the court those facts disclosed in the exhibits appended hereto.

The truth is, that when Mr. Tarlau called, he stated to deponent's receptionist, "I have some papers to serve in Nichols against Alker", and insisted upon serving them upon either deponent or his partner without any disclosure of their nature. Mr. Tarlau was then told to wait since deponent was engaged. He left without waiting after serving a copy of the motion papers.

It is respectfully submitted that were Jackson, admittedly a seasoned member of the bar, sincere in his desire to prevent a brother at the bar from making an alleged grevious error in professional conduct, he had only to pick up his telephone and not resort to having his junior make a request which would not or could not be honored in any well run law office.

WHEREFORE, deponent respectfully prays that the motion made by the defendant, Percival E. Jackson, be denied in its entirety, and for such other and further relief as to the Court may seem just and proper.

DAVID M. BERENSON.

(Sworn to November 15, 1954.)

Exhibit A-1 to A-5, Annexed to Affidavit of David M. Berenson

(Cover Page and Other Pertinent Pages of Recommendation for Findings and Supporting Brief of Long Island Lighting Company)

(Record Pages 79-83)

UNITED STATES OF AMERICA

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

IN THE MATTERS

OF

LONG ISLAND LIGHTING COMPANY,
QUEENS BOROUGH GAS AND ELECTRIC COMPANY,
NASSAU & SUFFOLK LIGHTING COMPANY,
LONG BEACH GAS COMPANY, INC.

File Nos. 54-136
59-83

(Public Utility Holding Company Act of 1935.)

DAVID K. KADANE,
General Counsel,
Long Island Lighting Company,
250 Old Country Road,
Mineola, New York.

CHARLES G. BLAKESLEE,
CHARLES R. PIERCE,
Of Counsel.

June 8, 1951.

[12] fied that the bulk of the Committee's work was performed prior to the early part of 1945 (S. M. 229-230). The Company believes that services performed after the institution of the revocation proceedings in November, 1944, are properly compensable and recommends that the Committee not be awarded a fee to exceed $1,000.00 for services performed in that period. If the Commission determines that services performed between May, 1942, and the sending of the letter to the Commission in February, 1944, are compensable it is recommended that the Committee not be awarded a fee in excess of $3,000.00 for services performed in that period. Any compensation for the period between the sending of the letter to the Commission and the institution of the revocation proceedings, if work in such period is compensable, should not exceed $1,000.00. The expenses of the Committee should be allowed to the extent that they were incurred in periods when services were compensable.

Unger & Pollack and Milton Pollack, counsel, and Jeffrey S. Granger, financial advisor, $350,000.00 fee, $1,566.31 expenses.

Granger was approached in 1941 by Wertheim and Company, representing preferred shares, and asked if he would interest himself in Long Island, which he agreed to do (S. M. 135-136). Consultation with Unger as to possible remedies available to the preferred holders revealed no feasible legal solution and it was decided to adopt a policy of watchful waiting (Grang. Pet. 87-88). Conversations with officers of the Company and the Chairman of the New York Commission ensued (S. M. 88), and the Committee was later organized in May, 1942 (S. M. 90).

Granger and Pollack state that it was in the fall of 1943 that this group first began to look in the direction of this Commission for relief (Grang. Pet. 96; Pol. Pet. 22).

Unger testified that, while he might not be correct on the date, he thought it was February, 1943, when he began consideration of Commission jurisdiction (S. M. 188). In any event, counsel found the 1936 exemption order obtained by Long Island squarely in their path and began to look for grounds whereby Long Island could be considered as engaging in interstate commerce (Grang. Pet. 96; S. M. 189). Granger read of a case in the newspapers [13] which had interpreted "interstate commerce" and sent it to Unger with his views (S. M. 190). Unger testified that he considered that suggestion the keystone of the subsequent steps taken by counsel to secure SEC jurisdiction (S. M. 191). In December, 1943, Unger began an investigation of Long Island affairs as they might bear on the interstate commerce question (S. M. 180-181).

In February, 1944, the Committee of Preferred Stockholders wrote a letter to the Commission requesting that the exemption of Long Island be revoked or modified (Pol. Ex. 2). Shortly thereafter the 1944 plan of recapitalization of Long Island was submitted to the New York Commission by the Company (Pol. Pet. 24). The Committee opposed this plan and solicited proxies for the special stockholders meeting, but more than the required two-thirds of the preferred holders voted approval (Pol. Pet. 26). Counsel appeared at subsequent hearings before the New York Commission which finally approved the plan in December, 1944 (Pol. Pet. 26-27, 32). Meanwhile, on November 4, the Committee had filed a petition with this Commission for the revocation or modification of the exemption of Long Island from the Act; the Commission ordered hearings on the issue (Pol. Pet. 29, 30).

Pollack expressed as the "vital aspect" of their services the organization of the preferred stockholders, the "arousing" of the New York Commission, the negotiations

with the Company, the creation of an atmosphere of pressure which forced the company to make a move towards a plan, and the "invention" of grounds of interstate commerce which would support the Commission's jurisdiction (S. M. 79-80). The efforts to organize the preferred stockholders met with the light response of 5% (S. M. 82), compared with the "Langley" Committee's representation of over 50% of the same class of stock (S. M. 375). Pollack's explanation of the benefit conferred by "arousing" the New York Commission is that they generated the interest of the Chairman in the possibility of federal reorganization which generated the search for a basis of federal jurisdiction (S. M. 83). The fact is that the New York Commission approved the 1944 plan which counsel had opposed before them (S. M. 84, 85). An attempt is also made to illustrate benefit flowing [14] from conversations with the Company and such "pressure" as they allege to have manufactured. The benefit claimed is the filing of the 1944 plan by the Company (S. M. 85-92), the very plan they opposed.

The last "vital" item enumerated was the "invention" of grounds of interstate commerce, the facts of which were alluded to previously. It has been admitted that Granger, who practised law for two years, thirty years ago (S. M. 153), suggested the legal solution which put their research on the proper path.

Counsel did only two things worthy of note in this proceeding: the writing of the letter to the SEC in February, 1944, and the subsequent filing of the revocation petition. Their arrival at the stupendous fee of $350,000.00 for these services was based on the assumption that they were the first to seek relief from this Commission, and their own notion of the importance of that fact (S. M. 94-95). However, Munson, another applicant in this proceeding, wrote a letter to the Commission on March 1, 1943, requesting an

investigation into the Long Island System (Munson Pet., Ex. "A") and was retained for the specific purpose of securing Commission jurisdiction over Long Island (S. M. 336, 344-345). Pollack's cross-examination of Jackson at the fee hearings developed the fact that Jackson had advised Munson's client, Duff, as early as 1941 to attempt to get Long Island under the Commission's jurisdiction because sufficient grounds existed to justify the revocation of the exemption (S. M. 313-320).

The participation of Pollack in the Section 11(e) hearings on the 1945 and 1948 plans was primarily through the means of "observers" who were sent to attend the hearings when it appeared that matters of interest might develop (S. M. 117, 120). Pollack's opinion is that the crucial events occurred in 1944-45 (S. M. 13). After that he furnished "sentinel" services, especially after the filing of the 1948 plan (S. M. 123).

For the guidance of the Commission, in the event that it desires to make a determination as to the compensability of the services performed prior to the filing of the petition in the revocation proceedings[1], [15] the Company has made recommendations for services performed in each of three specific periods. The Company recommends that the applicants not be allowed a fee greater than $10,000.00 for services performed between the time of the filing of the revocation petition with the Commission in November, 1944 and the consummation of the amended plan of consolidation in 1950. It is recommended that applicants not

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[1] In Chapter X proceedings, the compensability of services performed prior to the filing of the petition depends upon their "direct contribution" to the reorganization. "Chance and unwitting action, or activities a year or so earlier to control the course of creditor pressure upon the debtor, would seem clearly outside the narrow limits of the precedents." *Finn* v. *Childs Co.*, 181 F. 2d 431, 440 (C. A. 2) 1950.

be allowed a fee greater than $15,000.00 for services performed between the commencement of their activities in 1941-42 and the mailing of the "Gray" letter to the Commission in February, 1944, if the services performed in that period are compensable. If the services performed between the mailing of the "Gray" letter and the filing of the revocation are compensable, the Company recommends that the allowance not exceed $50,000.00 for services performed in that period. Expenses should be allowed to the extent that they were incurred in periods of compensability.

LONG ISLAND LIGHTING COMPANY 7% AND 6% PREFERRED STOCKHOLDERS GROUP

William C. Langley, Lawrence M. Marks, and Lee P. Stack, members, $16,986.98 expenses.

The members of this Committee request only reimbursement of the expenses incurred by them during this proceeding. The original petition of the Committee itemized expenses amounting to $14,935.72, of which a total of $1769.66 was spent in December, 1950, and January, 1951, well after consummation of the consolidation on October 24, 1950. These latter expenditures appear to have been in connection with the solicitations for nomination and election of a board of directors after the consummation date. The same applies to an item of $2051.26 which was the subject of a supplemental petition dated March 20, 1951.

The expenses of this committee incurred in connection with their efforts to elect a board of directors is not an expenditure which should

Exhibit B, Annexed to Affidavit of David M. Berenson

(Record Page 84)

HOME AND PROPERTY OWNERS ALLIANCE, INC.
Box 3136 Columbia Heights Sta.
Washington 10, D. C.
July 21, 1951.

Securities and Exchange Commission,
Washington 25, D. C.

Attention Division of Public Utilities

Gentlemen:

We understand that Mr. David K. Kadane, formerly of your staff, is no longer so engaged.

Would you be good enough to indicate the date on which his services with you were terminated and if possible would you kindly advise us as to his present address.

Sincerely yours,

HOME AND PROPERTY OWNERS ALLIANCE, INC.
By JACK PINKSTON

Securities and Exchange Commission
July 25, 1951

Mr. David K. Kadane was employed on the staff of this Commission from April 5, 1938 to December 4, 1946. Inquiry among his former associates has made available his present location and association as:

Long Island Lighting Company
Mineola, Long Island, New York

WILLIAM E. BECKER
Director of Personnel

7-25-51

Reply Affidavit of Percival E. Jackson, Read in Support of Motion of Defendant, Jackson, to Strike Complaint, etc.

(Record Pages 89-91)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PERCIVAL E. JACKSON, being duly sworn, deposes and says:

I am the moving party and make this reply to the attempted answer of plaintiffs' counsel. As I point out in the moving papers, the falsity of the charge that I and members of my Committee entered into a conspiracy to substitute a Federal reorganization for a New York State recapitalization with David K. Kadane while an employee of the Securities and Exchange Commission, is demonstrated by the fact (1) that the Langley Committee did not come into existence until March, 1948, after the transfer to Federal jurisdiction had been completely effected, and (2) that Mr. Kadane, as stated in his affidavit, permanently severed his connection with the Commission in March, 1946.

All that is to be found in the so-called answering affidavit is a statement that appears at page 4 of Exhibit A, thereunto annexed, that I had advised Munson's client, Duff, as early as 1941, to attempt to get Long Island under the Commission's jurisdiction. That is a fact. I was a friend of Duff who was interested in the Long Island pro-

ceeding as far back as 1941. As appears by the affidavit, Duff was represented in the proceeding by one Munson. I had sued the Long Island Lighting Company some years before in State Court actions and in the course of those actions, there were disclosures as to the holdings of Phillips, the principal owner of the old Long Island stock which, in my opinion, subjected the Long Island Lighting Company to the Federal interstate jurisdiction of the Securities and Exchange Commission. Accordingly, in a casual conversation with Duff, I told him what I thought.

That was in 1941. I had no connection with the litigation or the situation that ensued until we organized the Langley Committee in 1948, after the transfer to Federal jurisdiction had been completely effected.

The exhibit apparently unwittingly compounds plaintiffs' counsel's fault for it discloses that prior to 1948 the preferred stock committee that was interested in Long Island Lighting's affairs and indeed the one that got a substantial allowance for transferring the reorganization from the State to the Federal jurisdiction was the Gray Committee. Yet the plaintiffs' counsel includes these false allegations of connivance between the Langley Committee and Mr. Kadane while the latter was employed by the Securities and Exchange Commission, when plaintiffs' counsel should know from his own exhibit that it was the Gray Committee that was representing the preferred during that period and that it was the Langley Committee that was not in existence.

The second point of this syllogism is that Mr. Kadane severed his connection with the Commission on March 29, 1946. Despite Mr. Kadane's affidavit this lawyer brands this "a complete falsehood" (p. 6) and to prove it "a complete falsehood" he annexes a note on a letter written in 1951 which fixes the date of severance as December 4, 1946.

As between Mr. Kadane's recollection and the casual statement of the Director of Personnel, there can be no choice. However, for the purpose of this motion, the fact that Mr. Kadane severed his connection with the Securities and Exchange Commission in December, 1946 certainly precluded the Langley Committee, which did not come into existence until 1948, from conspiracy with Mr. Kadane while he was employed by the Commission, and that is the second point of our demonstration, both of which the answering papers attest and do not deny.

Obviously, the so-called answering papers only serve to confirm the moving papers, but it should be added that the lack of merit in the contention is so obvious that it serves to augment the misdemeanor of this lawyer who seems to have no appreciation of his obligation as a member of the Bar.

PERCIVAL E. JACKSON.

(Sworn to November 17, 1954.)

Reply Affidavit of William E. Becker, Read in Support of Motion of Defendant, Jackson, to Strike Complaint, etc.

(Record Page 93)

DISTRICT OF COLUMBIA

I, WILLIAM E. BECKER, Director of Personnel for the Securities and Exchange Commission, being duly sworn, depose and say that the official records of the Securities and Exchange Commission indicate the following facts with respect to the employment of Mr. David K. Kadane (date of birth, April 9, 1914):

Reply Affidavit of William E. Becker, Read in Support of Motion of Defendant, Jackson, to Strike Complaint, etc

1. Mr. Kadane initially was appointed to the staff of the Securities and Exchange Commission on April 5, 1938 and served continuously with that Commission through March 29, 1946, except that the records further indicate that Mr. Kadane's services were loaned to the National Housing Agency on a reimbursable basis effective March 4, 1946, pending his permanent transfer to that agency. The records further indicate that Mr. Kadane was separated from the staff of the Securities and Exchange Commission on March 29, 1946 by permanent transfer to the National Housing Agency.

2. Mr. Kadane subsequently was given an excepted appointment to the staff of the Securities and Exchange Commission as an Attorney-Consultant for the one day of December 4, 1946, to assist in consideration and disposition of problems pertaining to fees requested in the case of Standard Gas and Electric Company (File Nos. 54-72 and 59-66). Mr. Kadane served the one day in that capacity without compensation.

3. On the basis of the above, it appears that the statement made by affiant and which is contained in answer to an inquiry by Home and Property Alliance, Inc. dated July 21, 1951, was a clerical error.

WILLIAM E. BECKER.

(Sworn to November 19, 1954.)

Notice of Motion of Other Defendants to Strike Complaint, etc.

(Record Pages 59-60)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of David K. Kadane, verified November 12, 1954, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court at a Motion Part of the United States Court House Building, Washington and Johnson Streets, Borough of Brooklyn, County of Kings, City and State of New York, on the 17th day of November, 1954, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order pursuant to Rules 11 and 12 of the Rules of Civil Procedure, striking the complaint from the files of this Court, as sham, false, immaterial, and scandalous, and subjecting counsel for plaintiff to appropriate disciplinary action, and for such other and further relief as to this Court may seem just and proper.

Dated, Mineola, N. Y., November 12, 1954.

Notice of Motion of Other Defendants to Strike Complaint, etc.

Yours, etc.,

DAVID K. KADANE,
Attorney for Edward F. Barrett, Dougall C. Fraser, Samuel Hausman, James W. Carpenter, Errol W. Doebler, Robert G. Olmsted, Harry C. Hagerty, Thomas P. Booth, Vincent T. Miles, William C. Langley, Laurence M. Marks, Charles E. Elbert and Pro Se,
Office and P. O. Address,
250 Old Country Road,
Mineola, N. Y.

To:

BERENSON & MEISELS, Esqs.,
Attorneys for Plaintiffs,
120 Broadway,
New York City.

Affidavit of David K. Kadane, Read in Support of Motion of Other Defendants to Strike Complaint, etc.

(Record Pages 61-67)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DAVID K. KADANE, being duly sworn, deposes and says:

I am one of the defendants in the above entitled action and make this motion pursuant to Rules 11 and 12 of the Rules of Civil Procedure:

(1) To strike out as sham, false, immaterial and scandalous the complaint herein;

(2) To subject to proper disciplinary action David M. Berenson, a member of the firm of Berenson and Meisels, attorneys for the plaintiffs, who signs the said pleading, upon the grounds that he had no reasonable knowledge, information or belief that there is good ground to support said pleading, and that the same is replete with statements of purported fact which are wholly unwarranted.

The falsity of the statements contained in the complaint, in part, are as follows:

(1) In the caption of the case plaintiff Ennis M. Nichols purports to be acting Chairman and a member of a Committee of Common Stotckholders of Long Island Lighting

Company, and purports to be suing in the name of said Committee; whereas, in fact, there is no such committee and the class of securities which said Committee, during its life, represented was extinguished by order of this Court in 1950 upon approval of a reorganization plan under the Public Utility Holding Company Act of 1935. There are no other "members" of this purported committee.

(2) During the years 1944 up to and including 1950, neither Dougall C. Fraser, John Vanneck, Samuel Hausman, Lee P. Stack, Charles E. Elbert, Albert F. Tegen nor Laurence M. Marks were officers or directors of Long Island Lighting Company and the allegation in paragraph "10th" of the complaint to the contrary is false.

(3) It is not true, despite the allegations in paragraph "13th" of the complaint, that William C. Langley and Laurence M. Marks were members of the "Langley Committee during 1944 and through 1950, inclusive" as the Langley Committee was not organized until 1948.

(4) The "16th" allegation in the complaint states that a certain recapitalization plan became final and binding upon the filing of a Certificate of Reduction of Capital Stock in the Office of the Secretary of State of the State of New York. The United States Court of Appeals for the Second Circuit has held that any rights of plaintiff under said recapitalization plan have been fully compensated (183 F. 2d 345).

(5) The "17th" paragraph of the complaint alleges that the Langley Committee entered into negotiations with David K. Kadane, at the time employed by the Securities and Exchange Commission, for the purpose of undoing the said recapitalization plan. The fact is that the Langley Committee did not come into existence until long after

David K. Kadane had left the employ of the Securities and Exchange Commission.

(6) The "18th" allegation of the complaint is that the defendant directors of Long Island Lighting Company caused the Company to "surrender its exemption" under the Holding Company Act and submitted the Company to the jurisdiction of the Securities and Exchange Commission. The fact is that the Company did not "surrender its exemption" as that exemption was taken away from the Company by order of the Securities and Exchange Commission entered on April 21, 1945, after public hearings in which the Company had contested such action.

(7) The "19th" allegation of the complaint states that the surrender of the Company's exemption under the Holding Company Act "was accomplished through the connivance and cooperation of the defendants and each of them, and in concert with the defendant David K. Kadane" whereby proceedings were instituted by the Securities and Exchange Commission in this Court and temporary stays obtained "thus preventing the recapitalization of the predecessor corporation of the Long Island Lighting Company to become operative". There is not an iota of evidence anywhere, nor is it the fact, that there was any such connivance or cooperation and this allegation is sham and false. The fact is that Long Island Lighting Company hotly contested the action of the Securities and Exchange Commission, to restrain the consummation of the said recapitalization plan and won in this Court (59 F. Supp. 610) and in the Court of Appeals (148 F. 2d 252). A petition for certiorari to the Supreme Court of the United States was granted (324 U. S. 837). Harold M. Medina, now a Judge of the Court of Appeals for this Circuit, was

retained by the Company to contest this action of the Securities and Exchange Commission.

(8) The "21st" paragraph of the complaint alleges that the defendants caused the Company to register as a holding company under the Holding Company Act "thereby waiving its proper exemption therefrom". As stated above, there was no such waiver, and the Company registered as a holding company because under the law it was obliged to do so upon revocation by the Securities and Exchange Commission of its exemption from the Act.

(9) The "22nd" paragraph of the complaint alleges that "sometime between the years 1944 and 1950" the defendants conspired to defeat the vested rights of the plaintiffs in the said recapitalization plan. There is absolutely no evidence of any such conspiracy and, in fact, there was no such conspiracy and the ellegation therefore is sham and false, as is the allegation in the "23rd" paragraph that the acts alleged in the complaint were done by the defendants pursuant to a conspiracy.

(10) The "24th" paragraph of the complaint alleges that the defendants induced the Securities and Exchange Commission to institute the Federal Court to enjoin enforcement of the said recapitalization. Again there is absolutely no evidence to support this allegation and it is not true.

(11) The "25th" allegation is that the defendants induced the Company to file a reorganization plan with the Securities and Exchange Commission. The fact is that Section 11 of the Holding Company Act, to which the Company was subject after April of 1945, required either the filing of a reorganization plan by the Company or the institution of involuntary reorganization proceedings by the Securities and Exchange Commission. The only thing

that "induced" the Company to file a plan was the requirement of the Holding Company Act. Furthermore, the final terms of the plan ultimately approved by the Securities and Exchange Commission were at variance with those proposed by the Company and were, in fact, fixed by the Securities and Exchange Commission after public hearings at which the plaintiff was represented and took an active part.

(12) The "27th" paragraph of the complaint alleges that the defendants "intentionally and wrongfully concealed" from the Court of Appeals "the true earnings * * * in that they failed to disclose that the actual earnings of the Company were then far in excess of the maximum estimated earnings upon which approval of the said amended plan was predicated". There is absoultely no evidence, nor is it the fact, that there was concealment from any court or tribunal. The estimated earnings upon which the Securities and Exchange Commission determined the allegations in said plan, were based upon the properties of the Company as they existed early in 1949. Subsequently the Company was required to raise substantial additional amounts of capital including millions of shares of common stock to finance its expansion, and its earnings per share of common stock did not rise. The contention of plaintiffs in this "27th" paragraph, and many others included in this complaint, were rejected by the Court of Appeals (197 F. 2d 709) and the repetition thereof was rejected by the Court of Appeals as *res judicata* in *Nichols* v. *Long Island Lighting Company*, 207 F. 2d 931, 211 F. 2d 392.

(13) The allegation in the "28th" paragraph with respect to depreciation is also false and was rejected by the Court of Appeals in the decisions cited above, as well as the allegations in the "29th" paragraph of the complaint respecting natural gas.

(14) The "30th" paragraph alleges that the defendants induced and caused the Securities and Exchange Commission to delay its approval of plaintiff's proxy solicitation material. This allegation is false and there is absolutely no evidence to support it.

(15) The allegation in the "32nd" paragraph of the complaint that defendants induced the defendant David K. Kadane to resign as attorney for the Securities and Exchange Commission in charge of the reorganization proceedings of Long Island Lighting Company is false and utterly without evidence.

(16) The allegation in the "33rd" paragraph of the complaint that at Securities and Exchange Commission hearings the defendants Elbert, Barrett, Olmsted and Booth "knowingly gave misleading testimony" as to the financial situation and the earnings prospects of the Company is false and absolutely without supporting evidence; and defendant Elbert did not even testify before the Securities and Exchange Commission.

(17) Finally, the "36th" paragraph of the complaint alleges that as a result of the reorganization of the Company under the Holding Company Act, plaintiff was damaged in the amount of $50,000,000. The fact is that the reorganization plan under the Holding Company Act was approved by the Securities and Exchange Commission, this Court and the United States Court of Appeals as fair and equitable, fully compensating plaintiff for the value of his rights, and therefore plaintiff has not been damaged at all. (*In re Long Island Lighting Company*, 89 F. Supp. 513; aff'd 183 F. 2d 45; cert. den. 340 U. S. 834).

(18) The allegations in this complaint are the same as those which were made in *Nichols* v. *Long Island Light-*

ing Company, decided against plaintiff at 207 F. 2d 931, 211 F. 2d 392, on the merits. This action is a bald attempt to relitigate what has already been decided adversely to plaintiff in three separate pieces of litigation and is an imposition on the time and attention of the Court and of counsel. Its sham, false and scandalous nature is apparent from facts appearing in decisions of this Court and of the Court of Appeals, and so thoroughly permeate the entire complaint that the complaint should be stricken as sham and false as well as immaterial and scandalous, and the attorney who signed the complaint should be subject to disciplinary action.

DAVID K. KADANE.

(Sworn to November 12, 1954.)

Affidavit of David M. Berenson, Read in Opposition to Motion of Other Defendants to Strike Complaint, etc.

(Record Pages 86-87)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DAVID M. BERENSON, being duly sworn, deposes and says:

I am a member of the firm of Berenson & Meisels, attorneys for plaintiffs herein, and appear for the purpose of

showing the motion made by David K. Kadane is jurisdictionally defective.

On Friday, November 12, 1954, at 6:10 P. M., the instant moving papers were served upon deponent's firm.

Inasmuch as this motion was made returnable on November 17th, 1954, the same did not constitute, as required by Rule 6 of the Rules of Civil Procedure, service of not less than five (5) days before the time specified for the hearing.

It is respectfully submitted such service makes the motion defective, not properly before this tribunal, and the Court should not hear the same.

WHEREFORE, deponent respectfully prays that motion brought in the above matter by David K. Kadane be declared a nullity and for such other and further relief as the Court may deem just and proper.

DAVID M. BERENSON.

(Sworn to November 16, 1954.)

Opinion of Galston, *D. J.*

(Record Pages 101-111)

In this action the plaintiff, on behalf of himself and other stockholders of the Long Island Lighting Company similarly situated, alleges in effect that the defendants conspired for the purpose of destroying the rights of the plaintiff and other stockholders similarly situated by causing the Securities and Exchange Commission to institute proceedings in the federal courts to enjoin enforcement of a so-called 1944 Recapitalization, approved by the Public Service Commission of the State of New York; that as part of the alleged fraud, the defendants induced the Long Island Lighting Company to file a plan of reorganization with the Securities and Exchange Commission to the damage of the interest of the plaintiff and those whom he alleges he represents. The plaintiff and those similarly situated, so the plaintiff alleges, sustained damages in the amount of fifty million ($50,000,000) dollars, with interest from October 24, 1950.

The filing of this complaint led to the present motions which are now before me for decision. One is by the defendant Percival E. Jackson for an order pursuant to Rule 11 of the Rules of Civil Procedure to strike the complaint from the files of this court as sham and false, and to subject counsel for plaintiff to appropriate disciplinary action. A second motion, similar in kind, pursuant to Rules 11 and 12, is made by the defendant David K. Kadane.

It will be helpful to consider a prior litigation involving the Long Island Lighting Company. In 1944 that company promulgated a plan of corporate reorganization which was approved by its stockholders and by the New York Public Service Commission with certain modifications. Thereafter an appropriate certificate of reduction of capital stock was filed with the Secretary of State of New York, but the

plan was not consummated because of injunction proceedings instituted by the Securities and Exchange Commission. See Securities and Exchange Commission v. Long Island Lighting Company, 59 Fed. Supp. 610; aff'd 148 Fed. 2d 252. During the pendency of the injunction proceedings, and after public hearings, the Securities and Exchange Commission revoked the Company's exemption as a holding company under the Public Utility Holding Act of 1935. Thereafter a plan of consolidation of the Company and its operating subsidiaries was approved by the Securities and Exchange Commission and by this court. See In re Long Island Lighting Company et al., 89 Fed. Supp. 513. In this proceeding Judge Kennedy, in his opinion, made a thorough review of the historic background of the corporations involved, of the administrative proceedings and of the issues involved. Judge Kennedy's decision was affirmed, 183 Fed. 2d 45; and cert. den'd, 340 U. S. 834. Motions were made before the United States Court of Appeals for this circuit on June 5, 1952 for reargument of the order affirmed by that court in 183 Fed. 2d 45. In the per curiam opinion it was stated:

> "The alleged ground for the relief prayed for was that each of said orders was entered 'under circumstances tantamount to fraud, effected and committed by Long Island Lighting Company upon the Securities and Exchange Commission, the court below and this court' " (197 Fed. 2d 709).

These motions, therefore, were denied after a consideration of the merits.

Not satisfied with the situation as it then resulted, common stockholders, in November 1952, brought an action in this court, Nichols v. Long Island Lighting Company. Judge Inch dismissed the action, and the plaintiff appealed.

See Nichols et al., 207 Fed. 2d 931. The Court of Appeals, with Judge Augustus Hand writing the opinion, held that the Securities and Exchange Commission's order of consolidation and reorganization was final, and that the plaintiff's action for fraud was a prohibited, collateral attack upon the decree enforcing that order. See also Nichols et al. v. Long Island Lighting Company et al., 211 Fed. 2d 392; cert. den'd October 14, 1954, and petition for rehearing denied by the Supreme Court on November 15, 1954.

It is fairly clear, on the basis of documents drafted by plaintiff's attorneys in Nichols v. Long Island Lighting Company, 207 Fed. 2d 931, that the matter sought to be litigated in the present action is identical with that litigated by plaintiff in that case, and In re Long Island Lighting Company et al., 197 Fed. 2d 709.

The following passage, referring to the present action, appears in a Petition for Rehearing on a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, filed in the former case:

> "Since the denial of the petition for certiorari herein, action has begun by these plaintiffs in the United States District Court for the Eastern District, through other counsel against numerous individuals and the estate of the former general counsel for the Long Island Lighting Company, who are or were directors and officers of the Long Island Lighting Company at the time of the perpetration of the fraud and conspiracy alleged *in the complaint here and re-stated and amplified in the complaint in said action.*" (Italics mine.)

Regardless of what plaintiff now contends, it is clear that by his own admission the cause of action in the instant

case and the former cases are identical in substance, if not in language, though now the damage asserted, instead of being $27,500,000, is alleged to be $50,000,000.

The only question left in determining whether the matter here is res judicata is that of parties. During the course of the hearing, and in the oral argument on the Jackson motion, the plaintiff conceded that the critical allegations of the complaint related to issues that were res judicata. His contention was that the doctrine of res judicata was not applicable in these circumstances because the defendants named were not the defendants in the prior litigations, and that there was no privity between the defendants in this litigation and the Long Island Lighting Company, the sole defendant in the prior litigation. The plaintiff is undoubtedly the same, and we are faced only with the problem of the defendants.

The defendants in the present action can be broken down into several groups:

(1) persons alleged to have been officers of the Long Island Lighting Company

(2) persons alleged to have been directors

(3) agents of the company

(4) members of and counsel of a preferred stockholders' committee

(5) David K. Kadane, formerly of the Securities and Exchange Commission, and now General Counsel of the Company.

All these groups and Kadane, who stands alone, are mentioned in the former complaint and affidavits. In paragraph six of the former complaint in Nichols v. Long Island Lighting Company, supra, the allegation appears that the

corporation "acting through its officers, directors, attorneys and agents * * * conspired with certain preferred stockholders". The Aron affidavit in opposition to a motion for summary judgment in that action alleges that Kadane was a party to the alleged "conspiracy".

A corporation is not an empty shell. It acts through its officers, directors and agents. Litigation involving alleged fraud and conspiracy by a corporation would be res judicata in favor of such persons who conducted its affairs and determined its policies if the plaintiff failed in an action against the corporation to prove the existence of the fraud or conspiracy.

It must also be recognized that the application of res judicata no longer stands on absolute identity or privity of the parties. In Bruszewski v. United States, 181 Fed. 2d 419, the court said:

> "* * * where, as in this case, res judicata is invoked against a plaintiff who has twice asserted essentially the *same claim against different defendants*, courts have * * * enlarged the area of res judicata beyond any definable categories of privity between the defendants." (Italics mine.)

See Riordan v. Ferguson, 80 Fed. Supp. 973; Liberty Mutual Ins. Co. v. George Colon & Co., 260 N. Y. 305. In Restatement of the Law, Judgments, page 389, Sec. 83, it is said that the general rule is:

> "A person who is not a party, but who is in privity with the parties in an action terminating in a valid judgment, is, to the extent stated in Sec's 84-92, bound by and entitled to the benefits of the rules of res judicata."

If the contention is that Rule 12 is not available, on the motion made by Kadane to dismiss the complaint on the

ground that no answer has been filed and res judicata must be raised by defense, the contrary follows from the case of Hartman v. Time, Inc., 166 Fed. 2d 127. The Hartman case was followed by Bloomfield Ave. Corporation v. Montclair Manufacturing Co., Inc., 90 Fed. Supp. 1020.

All that remains, therefore, is to reiterate the holding of Judge Hand in 207 Fed. 2d 931, that the proceedings in review of the consolidation plan act as a complete bar to the plaintiff's claim of fraud. He wrote:

> "* * * the plaintiffs strenuously opposed the approval of the plan in those proceedings and at that time presented most of the claims made here. They have not presented us with any new claims of fraud that were not known at the time of our decision on the motion to reopen the order in 1952. (197 Fed. 2d, 709). While the claims made here may sound in tort, they are really the same claims heretofore litigated and determined by us against the plaintiffs.
>
> "For the foregoing reasons we affirm the order of dismissal * * * because our prior decisions are res judicata and as such a bar to the present action."

In sum, it may not be an understatement to infer from the circumstances that have been related that the complaint charges a conspiracy against these defendants to accomplish a result which has been approved by this court and the Court of Appeals.

In the matter of jurisdiction, the failure of the plaintiff to allege the citizenship of each defendant should lead to a dismissal of the complaint for want of jurisdiction. See the careful review in Indemnity Insurance Co. of North America v. Pan-American Airways, 57 Fed. Supp. 980. If this were the only jurisdictional defect it could be cured

doubtless by amendment. But an amended complaint could not cure the critical issue of res judicata. There must come an end of litigation. The present complaint, as has been stated, rests on the charge of fraud and conspiracy. Those matters were effectually disposed of in prior litigation, and it is with some concern that one finds them here repeated.

The complaint may also be criticized for its misstatement of facts. On the basis of public records, during the years 1944, up to and including 1950, Dougall C. Fraser, John Vannek, Samuel Housman, Lee P. Slack, Albert F. Tegen and Laurence M. Marks were neither officers nor directors of the Long Island Lighting Company.

Again the complaint alleges that for the purpose of undoing the proposed State re-capitalization plan, the Langley Committee entered into negotiations with David K. Kadane at a time when the latter was employed by the Securities and Exchange Commission. The fact is that that committee did not come into existence until 1948, and according to the records of the Securities and Exchange Commission, Kadane was separated from its staff on March 29, 1946.

Another misstatement in the complaint is that the defendant Elbert is accused of knowingly giving misleading testimony in the reorganization proceedings before the Securities and Exchange Commission. If the draftsman of the complaint, or Berenson, a member of the firm of plaintiff's attorneys of record who signed the complaint, had consulted the transcript of the proceedings of the Securities and Exchange Commission, he would have found that Elbert had not testified before the Commission during the reorganization proceedings.

The complaint alleges that the action is brought on behalf of twenty-five hundred common stockholders of the

Long Island Lighting Company, and that the plaintiff was duly authorized by those stockholders holding upwards of 750,000 shares of its common stock "to act for and represent them, and to act as agent, attorney, and transact for and in the name of said stockholders any actions and proceedings relating to such stock and in any court, none of which authorizations have, to the best of plaintiff's knowledge and belief, been revoked or withdrawn". In the light of the statements which accompanied the solicitations for these authorizations, it would seem that such authority did not encompass the bringing of an action such as this, but that on the contrary such authority was limited to the reorganization proceedings which were concluded in 1950. See letter of June 14, 1948 addressed to such common stockholders, and signed by J. Donald Halsted, B. F. Grizzle, and by E. M. Nichols, the plaintiff herein.

It is on the basis of the inaccuracies and misstatements, and the fact that the issues set up in this complaint have been decided adversely to the plaintiff, that part of the present motion seeks to have that member of the plaintiff's attorneys of record who signed the complaint disciplined pursuant to the provisions of Rule 11 of the Civil Practice Act, and to have the complaint stricken as sham.

When the Kadane motion was called for argument, following the argument on the Jackson motion, Mr. Berenson declined to argue the motion on the ground that he had not received the full five days' notice required by our rules. I suggested to him that he could put in reply affidavits to the Kadane moving papers, but that he declined to do. I was not in the slightest degree impressed by his good faith in this respect, for I find in his affidavit opposing the Jackson motion that he had been working on this case for the last six months.

From what has been said above, the complaint will be dismissed, and stricken from the files as sham.

In respect to that part of the motion which seeks to have counsel disciplined, attention is called to Rule 5 of the rules of this court which sets forth that the chief judge of the court shall have charge of all matters relating to the discipline of members of the bar. In consequence the motions before me are decided to the extent noted; but that part of the motion to discipline the attorney is denied. The latter denial, however, is without prejudice to the institution of proceedings conformable to the provisions of Rule 5. Settle orders.

CLARENCE G. GALSTON,
U. S. D. J.

Order Appealed From

(Record Pages 118-120)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

A motion having been made herein on behalf of defendant Jackson to strike the complaint from the files of this Court and to punish plaintiffs' attorney, David M. Berenson, Esq., pursuant to Rule 11 of the Federal Rules of Civil Procedure, and motions having been made herein on behalf of defendants Barrett, Fraser, Hausman (sued herein as Housman), Carpenter, Doebler, Olmsted (sued herein as Olmstead), Hagerty, Booth, Miles, Langley, Marks, Elbert, Kadane and Vanneck (sued herein an Vannek) (the last named as to Rule 12 only) to dismiss the complaint and

to strike it from the files of this Court, and to punish plaintiffs' attorney, David M. Berenson, Esq., pursuant to Rules 11 and 12 of the Federal Rules of Civil Procedure, and the said motions having duly come on to be heard before this Court, at a motion part thereof, held at the United States Court House for the Eastern District of New York, 271 Washington Street, Brooklyn, New York on the 17th day of November, 1954, and Percival E. Jackson, Esq., pro se, Charles C. Lockwood, Esq., on behalf of defendant Vanneck, and David K. Kadane, Esq., on behalf of defendants Barrett, Fraser, Hausman, Olmsted, Carpenter, Doebler, Hagerty, Booth, Miles, Langley, Marks, Elbert, and pro se having appeared and argued in support thereof, and David M. Berenson, Esq., having appeared and argued in opposition thereto, and a stipulation dated December 2, 1954 having been entered into by and between plaintiffs' attorney and the attorney for defendants Blakeslee, Coe, Crummey (sued herein as Crummie), Tegen and Koons (sued herein as Coons) binding plaintiffs and said defendants by the decision on said motions, which stipulation has been filed in this proceeding, and this Court having made and filed its opinion herein dated December 14, 1954;

Now, upon all of the papers submitted on these motions, and upon the proceedings heretofore had as outlined in the said submitted papers, and upon the said opinion dated December 14, 1954, it is

ORDERED that the complaint herein be and the same hereby is dismissed; and it is further

ORDERED that the complaint herein be and the same hereby is stricken from the files of this Court; and it is further

ORDERED that the motions to punish plaintiffs' attorney are denied, without prejudice to the institution of proceedings pursuant to Rule 5 of this Court; and it is further

ORDERED that judgment be entered accordingly.

CLARENCE G. GALSTON,
United States District Judge.

December 23, 1954.

Notice of Appeal

(Record Page 126)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

NOTICE IS HEREBY GIVEN that Ennis M. Nichols, individually and on behalf of other stockholders of Long Island Lighting Company, similarly situated, and as acting chairman and member of the committee of the Common Stockholders Committee of Long Island Lighting Company, and Common Stockholders Committee of Long Island Lighting Company, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from so much of the order of this Court entered in this action on the 23rd day of December, 1954, which

dismissed the plaintiffs' complaint in this action and ordered same stricken from the files of this Court, and from the judgment entered herein on said date.

HAROLD G. ARON,
Attorney for Plaintiffs,
Office & P. O. Address,
Madison, Connecticut.

New York City Office:
8300 Talbot Street,
Kew Gardens, L. I., N. Y.

FILED
JUN 8 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1956

No. [redacted] 147

ENNIS M. NICHOLS, individually and on behalf of other Stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company, and Common Stockholders Committee of Long Island Lighting Company,

Petitioners,

against

HARRY A. ALKER, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT TO REVIEW A JUDGMENT OF THAT COURT DIRECTING A FINAL DISMISSAL WITHOUT TRIAL, OF AN UNANSWERED COMPLAINT OF THE PETITIONERS, FILED IN A COMMON LAW ACTION ALLEGING FACTS OF FRAUD AND CONSPIRACY, IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

HAROLD G. ARON,
Attorney for Petitioners.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y. 13, BEEKMAN 3-2320
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Supreme Court of the United States

October Term, 1956

No.

—o—

ENNIS M. NICHOLS, individually and on behalf of other Stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company, and Common Stockholders Committee of Long Island Lighting Company,

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HARRY A. ALKER, *et al.*,

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—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT TO REVIEW A JUDGMENT OF THAT COURT DIRECTING A FINAL DISMISSAL WITHOUT TRIAL, OF AN UNANSWERED COMPLAINT OF THE PETITIONERS, FILED IN A COMMON LAW ACTION ALLEGING FACTS OF FRAUD AND CONSPIRACY, IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners are the common stockholders of the Long Island Lighting Company, a New York corporation, numbering approximately eleven thousand on the 1st day of June, 1950, when the United States Court of Appeals for the Second Circuit affirmed an enforcement order of the United States District Court for the Eastern District of New York

(*in re Long Island Lighting Co.*, 89 F. Supp. 513, affirmed 183 F. 2d 45, first reversed and, without hearing, later affirmed, cert. denied 340 U. S. 834), upon the authority of the Public Utility Holding Company Act, under a reorganization ordered by the Securities Exchange Commission under Section 11(e) of that act in which, these petitioners, four years after the proceeding started without actual notice to them, having learned that such a proceeding was pending applied for and were granted by the Securities & Exchange Commission a "limited participation" in the hearings. As a result of this enforcement order, the petitioners' interest in the reorganized company was reduced from 49.7% in the original Long Island Lighting Company, to a cash distribution, equivalent to a 5.7% in the reorganized company, at a time when the net earnings of this utilities system had passed four million ($4,000,000) dollars annually.

The petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, finally dismissing without trial or answer by the defendants, this action in which it is charged under oath that PUHCA, the regulations, procedure and practices of SEC thereunder and the whole Federal judicature has been used by these defendants to consummate a documented and admitted scheme, devised and guided by David K. Kadane, former counsel for SEC, who here appears as attorney for four-fifths of the defendants, to accomplish a fraud on the petitioners to their damage in the sum of 50 million dollars, whose majority common stock was obliterated with a cash payment of less than one year's net earnings.

Opinions Below

The opinion of the Court of Appeals now sought to be reviewed was handed down four months after the appeal had been argued and is printed as Appendix A.

The opinion of the District Court (126 Fed. Supp. 679) on appeal from which the foregoing opinion was handed down, is printed as Appendix B.

In Appendix C are printed extracts from an affidavit used in opposition to a motion to dismiss the appeal and the affidavit and notice of motion submitted on a pending and undecided motion in the Court of Appeals.

Jurisdiction

(i) The judgment of the United States Court of Appeals of which review is sought is dated and was entered on the 14th day of February, 1956.

(ii) The order denying a rehearing is dated and was entered on the 13th day of March, 1956.

(iii) Jurisdiction to review the aforesaid judgment is conferred by the United States Code, Title 28, Section 1254.

Questions Presented for Review

In a clear cut common law action brought in the United States District Court for the Eastern District of New York for fraud and conspiracy, these defendants have been relieved of answering a verified complaint alleging a good cause of action for fraud and conspiracy and these plaintiffs, numbering more than 2,500 through over six years' litigation before the entire Federal judicature have been denied:

A. Their constitutional rights under the First, Fifth and Fourteenth amendments.

B. Trial by jury or in any other form or pretense before any Court, tribunal or administrative body, despite desperate efforts by the plaintiffs to procure some semblance of a trial with or without a jury.

C. The Right of Assembly and to counsel.

(See facts stated in opinion of Judge Kennedy in *Matter of Long Island Lighting Company*, 89 Fed. Supp. 513; also in the divided opinion of the Court of Appeals of the District of Columbia in *J. Donald Halstead* v. *Securities & Exchange Commission*, 182 Fed. 2, 660; also in the opinion of Judge Galston in 126 Fed. Supp. 679, from which this appeal is taken; also in an affidavit of Harold G. Aron, verified April 1, 1955, and included in the record certified to this Court on this petition.

D. Due process of law in the confiscation of their property to the value of $50 million with no pretence of resort to the power of eminent domain.

E. The procedural right to an answer by the defendants to plaintiffs' verified complaint, found in the Court below to state a good cause of action.

Chief Judge Inch on January 12, 1953, ordered as follows; since then there has been no motion made by defendants for summary judgment or dismissal:

"A motion having been made by defendant herein for summary judgment or for dismissal of the action for failure of the complaint to state a claim upon which relief may be granted, and, a motion having been made herein by intervenor Securities and Exchange Commission for dismissal of the action on the ground that same was brought in violation of a certain injunction order of this Court, dated February 17, 1950 in Civil Action No. 10413, and the said motions having duly come on to be heard before

this Court at a motion part thereof, held at the United States Court House for the Eastern District of New York, 271 Washington Street, Borough of Brooklyn, City and State of New York on the 17th day of December, 1952, and the said motion of the Intervenor Securities and Exchange Commission having been granted, now, therefore, it is

ORDERED, *that defendant's motion be denied without prejudice to a renewal of same in any further suit on the claim set forth in the complaint.*

(Sgd) ROBERT A. INCH,
United States District Judge."

In their brief below in the case now here, defendants' counsel, at page 12, stated as to the above quoted order:

> "The present action is virtually identical with one brought by this very appellant in an action entitled Nichols v. Long Island Lighting Co. (207 Fed. 2d 93; 211 Fed. 2d 302)."

That there has been no trial, and no reason for its denial, of the issue of fraud and conspiracy is apparent from the following quotations and the fact that the fraud and conspiracy were totally unknown to these plaintiffs until long after the enforcement order was affirmed.

In *207 Fed. 2d 931*, Judge A. N. Hand wrote as follows:

> "All the acts of fraud and conspiracy complained of by the plaintiffs took place before the plan of consolidation and reorganization was approved by the SEC and the Courts. If they were unlawful, that fact should have been established in that proceeding as there the rights of the stockholders in the new corporation were fixed. As the matter stands, the order of the SEC is final and not open to collateral attack."

In the opinion of the Court of Appeals now here, Judge Waterman, at page 738, writes:

> "Attempts by the present plaintiff to compel the SEC to receive testimony on the charges of fraud in the reorganization were dismissed by Judge Inch, following which we reaffirmed our previous holding on petition to amend."

In the affidavit of an attorney associated with David K. Kadane, former attorney for SEC and here appearing as attorney for most of the defendants, verified on May 10, 1956, and filed in the Court below, the statement is made:

> "Mr. Nichols then moved in the District Court for an order compelling the Commissioners of SEC to come to New York to receive testimony he proposed to adduce in support of his charge."

Statement of the Case

The case is factually well presented in the opinion of the Court of Appeals, printed in Appendix A.

The action now here was begun in December 1953, and was dismissed on December 23rd of that year by Judge Galston in the Eastern District. His opinion is contained in the record of this petition and is reported in 126 Fed. Supp. 679. Following the affirmance below after four months' consideration, the plaintiffs-appellants moved for a rehearing. Their petition is included in the record filed in this Court. After said affirmance and denial of the motion for rehearing, plaintiffs-appellants filed a motion in the Court of Appeals for the Second Circuit, asking the Court to direct defendants to answer the allegations of the complaint, directing the United States District Court for the Eastern District of New York to proceed with trial

by jury of the issues presented by the pleadings and petitioned it to exercise both its full, inherent and equitable power to correct its own errors and mistakes, and to revise "a decision induced by fraud".

It will be noted from the opinion below that in addition to the constitutional questions presented for review, there are also presented for review the following points:

I. There is here a complete conflict in the opinions of the Court below as to the grounds upon which its affirmance of the District Court was based, as clearly shown in the express language of the opinion of Judge Frank.

II. There is presented here a conflict of decision between the Court below and the Circuit Court of Appeals for the First Circuit (*Matter of Blatchley*, 157 F. 2d 894), which is disregarded as mere dictum in the opinion of the Court below.

III. The decision below is in conflict with applicable decisions of this Court.

(See Opinions by Chief Justice Hughes (*Morgan* v. *United States*, 298 U. S. 468, 304 U. S. 1; *Railroad Commission of California* v. *Pacific Gas and Electric Co.*, 302 U. S. 388); by Mr. Justice Brandeis (*St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38, 73); and by Mr. Justice Cardozo (*Ohio Bell Tel. Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292.)

In this connection, we refer to the study on administrative agencies prepared for the Commonwealth Fund in 1942 by Professor Joseph D. Chamberlain and others, The Judicial Function in Administrative Agencies, at pages 193-207 (see also Evatt, Rum Rebellion, page 169, alluded to by Professor Chamberlain.)

IV. There is also involved the question of deep public concern, as administrative law expands and encroaches on the adjective and probative law, whether a "limited participation" accorded, as a matter of grace, by an administrative agency satisfies the requirement of due process of law.

V. There is also involved the question whether enforcement orders in reorganization proceedings under the PUHCA or Chapter 10 of the Bankruptcy Act are a complete bar to any action for fraud and conspiracy perpetrated in such proceedings and consummated by such enforcement orders.

VI. There is also involved the question whether the time-honored effect of after discovered evidence has no application on judicial review of reorganization proceedings before the Securities and Exchange Commission—in short, whether an affirmed enforcement order bars the door to newly discovered evidence of fraud and conspiracy; in this instance, not uncovered or discovered until more than a year had expired after the Court of Appeals had affirmed the enforcement decree—in short, whether such decree seals off the conspiracy behind and the fraud in a reorganization proceeding.

VII. There is also involved the disregard of the District Court of the historic statement of a great Justice of this Court, Owen J. Roberts, when sitting as umpire of the Mixed Claims Division, United States and Germany, where for reasons which he stated in the following language he felt called upon to reverse his earlier decision in favor of the German Government. (Appendix of Opinions, 1933-1939, p. 1127):

> "The petition, in short, avers the Commission has been misled by fraud and collusion on the part of the witnesses and suppression of evidence on the part of some of them. The Commission is not *functus*

officio. It still sits as a court. To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion and suppression. No tribunal worthy of its name may allow a decision to stand if such allegations are well founded. Every tribunal has inherent power to reopen and revise a decision induced by fraud. It may correct its own errors and mistakes."

VIII. There is also involved the question whether findings of the Securities and Exchange Commission, virtually confiscating the half interest which these plaintiffs had in the original Long Island Lighting Company at the time of its reorganization affords any basis for a judicial determination under due process of law, when in fact, as admitted by the Securities and Exchange Commission, its finding of the maximum prospective annual earnings of the reorganized company was only an "informed guess" which has since proved to be 70% below the reported net earnings.

Reasons for Granting Writ

Petitioners believe that several of the criteria relevant to this Court's exercise of its reviewing power, as enumerated in Rule 19 of this Court, are applicable to this case. The Court below has "decided an important question of federal law which has not been, but should be, settled by this court"; it has "rendered a decision in conflict with the decision of another court of appeals"; is has decided a question involving the Federal Constitution in a way apparently "in conflict with applicable decisions of this court"; and it "has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision."

Petitioners strongly urge this Court to read carefully the decision of the Court of Appeals of which review is

here sought and which is reprinted herein as Appendix A. We believe that that decision adequately sets forth the basic factual background in this matter and that, more importantly, it demonstrates on its face that serious reasons for review by this Court are presented.

These petitioners admittedly have in the past brought certain matters relating to the reorganization of the Long Island Lighting Company to the attention of this Court in actions involving the Company but *not* the present defendants. The presentation of such earlier petitions for certiorari does not warrant summary denial of this petition on the basis of any general impression that this is merely an attempted relitigation of earlier matters. To the contrary, at no time has review by this Court been more clearly warranted. The fact that petitioners have been denied all opportunity to prove their charges in Court makes review in the present case imperative. And, most importantly, the decision below marks the first attempt by the Court of Appeals to consider the facts of this case in any detail and to provide any legal reasons for denying these petitioners their day in Court. For the first time, the Court of Appeals has provided this Court with a full opinion upon which to base review; in doing so, the Court below has been compelled to lay bare the flimsy legal basis for its denial of a trial to the petitioners—as Judge Frank's separate opinion makes clear. In view of these facts, it can hardly be maintained that petitioners' earlier proceedings provide any basis for denying review at this time.

The majority opinion below, in searching for a reason to justify its decision, relies on a ground which has no support in the precedents, which is admittedly in conflict with decisions of other Courts of Appeals, and which has evoked the strong dissent of Judge Frank in a separate opinion. Judge Frank's separate opinion, after demonstrating persuasively that the majority's legal reasoning has no merit, in turn relies upon principles of *res judicata*

which run contrary to the well-understood principles in that field. The net effect of the opinions below is to deprive petitioners of a trial and thus to violate their basic constitutional rights. Although, as we have suggested, the opinions below amply support the existence of these persuasive grounds for granting review, we shall comment briefly on some of the most serious problems presented by the decision below.

1. The basic reason relied upon by the majority below presents an important question with respect to the effect of orders of Federal Courts in reorganization proceedings under the Public Utility Company Holding Act and the Bankruptcy Act. The majority below, in holding that the existence of an enforcement order bars every traditional common law action for fraud and conspiracy which might have some remote relation to the subject matter of the reorganization proceeding, establishes a far-reaching and unsupportable principle of law. Petitioners believe that Judge Frank's concurring opinion adequately demonstrates the utter lack of merit in the majority's position. To hold, as the majority does, that a traditional common law action *not* brought against the company involved in the reorganization and *not* seeking to obtain any share of the assets of such company can be barred by an enforcement decree with respect to such company, is to deprive plaintiffs of their basic rights, without support in any statute and in direct conflict with constitutional principles.

2. As might be expected, the majority was unable to state any clear support for any such principle. To the contrary, it had to concede that such a doctrine conflicts with the position, for example, of the Court of Appeals of the First Circuit in *Petition of Blatchley*, 157 F. 2d 894, see footnote 10 of the opinion below. The dismissal of the First Circuit's position as mere dictum obviously cannot obscure the existence of a real and important conflict between the Circuits.

3. The ground relied upon by Judge Frank's opinion below, after its disavowal of the majority's legal principles, are equally unsupportable. Judge Frank purports to be relying upon principles of *res judicata*. His reasoning, however, represents an unheard of and unsupportable application of well understood principles:

(a) Concededly, the defendants in this suit were not parties to any of the prior actions brought by these petitioners. Under well established principles of *res judicata*, a prior judgment can only be relied upon as a defense by the parties to such prior proceeding or by persons in privity with such parties. Restatement of Judgments, Sections 79, 83. To consider the present defendants as being "in privity" with parties in the earlier actions is to use the term in a wholly Pickwickian sense.

(b) Moreover, Judge Frank purports to apply the doctrine of collateral estoppel. Such doctrine, again as clearly understood in the law of *res judicata*, see Restatement of Judgments, Section 68, applies only as to matters actually litigated in a prior proceeding. Here, petitioners have never had an opportunity to litigate and demonstrate their charges. Thus, even if the privity concept had any application to this case, invocation of collateral estoppel principles here is wholly unsupportable.

4. The effect of the decision below, in denying to petitioners any trial of their claims, is to deprive them of their basic constitutional rights.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

ENNIS M. NICHOLS,
Petitioner.

HAROLD G. ARON,
Attorney for Petitioners.

Appendix A

(Opinion of Court of Appeals, Second Circuit)

Before FRANK, HINCKS, and WATERMAN, *JJ.*

WATERMAN, *Circuit Judge*:

Plaintiff appeals from an order of the United States District Court for the Eastern District of New York (Galston, *J.*) dismissing the complaint on the ground of *res judicata* and striking it from the files of the District Court as sham and false. The complaint was filed by Ennis M. Nichols, individually, and as representative of a group of common stockholders of the pre-reorganized Long Island Lighting Company ("Long Island"), and was brought against four groups of defendants: (1) officers and directors of the pre-reorganized Long Island (Alker, Barrett, Blakeslee, Fraser, Vannek, Housman, Slack, Elbert, Carpenter, Coe, Doebler, Link, Crummie, Hagerty, Tegen, and Marks); (2) agents of the pre-reorganized Long Island (Barrett, Olmstead, and Booth); (3) members and counsel of a preferred stockholders' committee (the Langley Committee) representing certain preferred stockholders of the pre-reorganized Long Island (Langley, Marks, Jackson); and (4) David Kadane, formerly of the Securities and Exchange Commission ("S. E. C."), and now general counsel of the present Long Island. The complaint alleges in substance that these groups and Mr Kadane fraudulently conspired together to defeat rights of the old common stockholders of the Long Island, allegedly created by and established under a 1944 plan of recapitalization of the Long Island ("the 1944 plan") which had been approved by the New York Public Service Commission. The same or strikingly similar charges have been before this court on four previous occasions. *In re Long Island Lighting Co.*, 89 F. Supp. 513 (E. D. N. Y., 1950), aff'd sub nom. *Common Stockholders Committee* v. *S. E. C.*, 183 F. 2d 45

(1950), cert. den. 340 U. S. 834 (1950), pet. to reopen den. 197 F. 2d 709 (1952); *Nichols* v. *Long Island Lighting Co.*, 207 F. 2d 931 (1953), cert. den. 348 U. S. 827 (1954), pet. for rehearing den. 348 U. S. 884 (1954), pet. to amend den. 211 F. 2d 392 (1954). Reference to these opinions and to the opinion of Judge Kennedy enforcing the plan of reorganization approved by the S. E. C., *In re Long Island Lighting Co.*, 89 F. Supp. 513 (E. D. N. Y., 1950), will supply in profuse detail the factual background of the present action.

It is desirable to summarize the history of the reorganization of the Long Island and the resulting litigation. By 1937 the Long Island had suspended full payment of dividends on its preferred stock. At this time and until 1945, the Long Island had been granted an exemption by the S. E. C. from the registration provisions of the Public Utility Holding Company Act of 1935, 15 U. S. C. A. § 79 *et seq.* ("P. U. H. C. A.").[1] The financial position of the Long Island and its subsidiaries continuing to deteriorate, the Long Island in 1944 submitted a reorganization plan to its stockholders. Under this plan the par value and current dividend rights of its preferred stock were to have been reduced by 40 per cent, the accrued dividend arrears of the preferred were not to be affected, and a new issue of common stock was to have been distributed approximately one half to the holders of preferred and one half to the holders of common. Although the plan was approved by the stockholders, and, with some modifications, by the

[1] The exemption from the provisions of the P. U. H. C. A., according to the terms of the Act, 15 U. S. C. § 79c(c), was subject to revocation or modification, after notice and opportunity for hearing, in the event of changed circumstances. See *Long Island Lighting Co.*, 1 S. E. C. 345; 18 S. E. C. 717.

Public Service Commission of New York, it was never put into effect.[2]

Shortly before the 1944 plan of reorganization was to be consummated, certain dissenting preferred stockholders of Long Island, realizing that the Public Service Commission of New York had only limited powers to compel readjustment of stock interests or voting rights, filed with the S. E. C. a petition asking the S. E. C. to revoke or modify the exemption previously granted. In November, 1944, the S. E. C. instituted proceedings to determine whether the exemption should be revoked or modified, and in December, 1944, the S. E. C. instituted an action in the United States District Court to restrain Long Island from taking any further steps to consummate the 1944 plan pending a determination by the S. E. C. as to whether the provisions of the P. U. H. C. A. should be extended to the Long Island. This attempt to enjoin the consummation of the plan failed in the first instance, *S. E. C.* v. *Long Island Lighting Co.*, 59 F. Supp. 610 (E. D. N. Y., 1944), aff'd 148 F. 2d 252 (2 Cir., 1945), and the certiorari granted by the Supreme Court, 324 U. S. 837, became moot, 325 U. S. 833, when the S. E. C. completed its proceedings and revoked the exemption of Long Island from the P. U. H. C. A. The Long

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[2] The Public Service Commission of New York expressed dissatisfaction with the 1944 plan and stated that it was overly favorable to the holders of common stock. After referring to deficiencies in the capital structure and in the distribution of voting power among the stockholders of the Long Island, the Commission concluded with an invitation for S. E. C. intervention:

> The power of the Commission [the Public Service Commission] to remedy this condition directly is nil. The Security and Exchange Commission has dealt summarily with such conditions in companies under their jurisdiction, but we have no power to compel a company to readjust its stocks or voting rights in accord with what is considered sound finance and equitable considerations.

I Annual Report of P. S. C. for 1944, p. 555.

Island, which had heretofore contested the revocation of its exemption, now acquiesced in the order of the S. E. C., and registered in accordance with the provisions of the P. U. H. C. A.

In 1945 Long Island filed an application with the S. E. C. under § 11(e) of the P. U. H. C. A., 15 U. S. C. A. § 79k(e) for approval of a plan of reorganization and consolidation of Long Island with other New York public utilities. For 4 years thereafter various plans were under consideration by the S. E. C. The Public Service Commission of New York was also involved in consideration of these plans until 1948, when it was held that it had no jurisdiction with respect to the allocation of securities of New York public utilities which were being reorganized under § 11(e) of the P. U. H. C. A.[3] *In re King's County Lighting Co.*, 72 F. Supp. 767 (E. D. N. Y., 1947), aff'd sub nom. *Public Service Commission of New York* v. *S. E. C.*, 166 F. 2d 784 (2 Cir., 1948), cert. den. 334 U. S. 838. The present plaintiffs formed a common stockholders committee in 1948 and took part in the S. E. C. proceedings. On November 16, 1949, the S. E. C. entered an order of consolidation and reorganization which, although giving the old common stockholders of Long Island much less than the 1944 plan, gave them in excess of 5 per cent of the new common stock

[3] The plaintiffs have contended ever since 1948 that the reorganization of the Long Island should have been governed by New York law, and carried out under the jurisdiction of the Public Service Commission. They charge that the removal of the Long Island from the jurisdiction of the state commission to that of the S. E. C. was a wrongful act. They overlook the fact that we have held: (1) that the S. E. C. was given jurisdiction by Congress over the reorganization of the Long Island, 183 F. 2d 45, 48; (2) that the New York Public Service Commission did not have jurisdiction over the reorganization of the Long Island, 166 F. 2d 784; and (3) that federal law governs in a reorganization carried out under the P. U. H. C. A., 166 F. 2d 784.

to be issued. A petition for enforcement of this plan was granted by the District Court after a finding that the plan was fair and equitable. *In re Long Island Lighting Co.*, 89 F. Supp. 513 (E. D. N. Y., 1950). We affirmed, 183 F. 2d 45, and certiorari was denied by the Supreme Court, 340 U. S. 834.

In April, 1952, approximately 18 months after the consummation of the reorganization, the present plaintiffs sought to set aside the order, reopen the proceedings, or be granted leave to file a bill of review in the District Court, on the ground that the order was entered "under circumstances tantamount to fraud effected and committed by said Long Island Lighting Company upon the Securities and Exchange Commission, the court below and this court."[4] We denied this motion, finding that the "facts

[4] The factual charges of fraud raised in 1952 in the petition to reopen, and in the petition for rehearing after the petition had been denied, were as follows: (a) the officers and counsel of Long Island knowingly overstated the depreciation reserve in the proceedings before the S. E. C., the district court, and this court; (b) they "radically and fraudulently" changed their position with respect to this depreciation reserve; (c) they knowingly understated prospective earnings of the Long Island and deliberately concealed the true facts relating thereto; (d) an omnibus allegation, quoted below, which contained in capsule form almost every allegation made in this case, viz.:

"(6) Rehearing and reargument will afford this Court on a fuller showing of the facts, an opportunity to decide the paramount issues presented by the petition:

"(A) Whether there is nothing in the ten year judicial and commission history of this proceeding, to shock the conscience of the Court, *where* a re-organization of the Long Island Lighting Company, an intrastate New York corporation, completed to the finality of the cessation of trading in the stock of the Company, under the statutes of New York state, is abrogated without notice, much less consent of its common and only voting stockholders, by the forcible entry and intervention of a Federal commission, which at the time of such intervention was totally with-

alleged in the petition do not show that fraud was practiced upon the Commission, the District Court, or this Court", *In re Long Island Lighting Co.*, 197 F. 2d 709 (2 Cir., 1952).

Then, in November, 1952, the present plaintiffs sued the reorganized Long Island in an independent tort action alleging that the Long Island's predecessor corporation conspired with certain of its preferred stockholders to defeat rights of the plaintiffs allegedly created by and established under the 1944 recapitalization plan. The S. E. C. moved to intervene and dismiss the action as a collateral attack on the 1950 decree enforcing the consolidation. That decree contained an injunction, pursuant to 15 U. S. C. A.

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out authority, as this Court has previously decided (148 Fed. 2d 252); *where*, without knowledge, much less consent of its stockholders, the Company surrenders, in the face of and because of such decision, its immunity from the jurisdiction of the Securities and Exchange Commission; *where* to accomplish this intervention and oust the State of New York of its authority, the first move is counselled, in appearance before this Court eight years ago, by a specially retained attorney for the S. E. C. who, after repeated intermediate appearances on its behalf, on the accomplishment of the intervention in this very Court in this very proceeding, now appears as general and special counsel for the same company, the Long Island Lighting Company, against which he first appeared in this Court on a motion against it to enjoin its state-approved and completed re-organization; *where* that intervention was admittedly based on an 'invention' by certain lawyers of preferred stockholders of supposititious grounds to inject S. E. C. into the reorganization, to supersede the Public Service Commission of New York and to frustrate the unassailable recapitalization of the Long Island Lighting Company in 1944 by the action of more than two-thirds of its stockholders; *where* the result of that intervention was to reduce the participation in the common stock of the re-organized company of these petitioners from 49% to less than 6%; *where* that reorganization is accomplished by denying these petitioning stockholders for a period of eight years any opportunity to meet and elect or remove directors and by preventing those stockholders from obtaining or contributing funds for the common defense of their rights."

§ 79k(e) and § 79r(f) to the effect: "(10) Long Island Lighting Company, Queens Borough Gas & Electric Company and Nassau & Suffolk Lighting Company, and all their creditors and security holders, and all persons be, and they are hereby enjoined and restrained from doing any act or taking any action interfering with, or tending to interfere with, these proceedings * * * including the commencement or prosecution of any action, suit or proceeding, at law or in equity, or under any statute, in any court or before any executive or administrative officer, commission or tribunal, other than such proceedings before the Commission or this Court as may be authorized by the Act or the Rules and Regulations promulgated thereunder, and such review, if any, in an appropriate Court of Appeals as may be provided by law." The District Court, per Judge Inch, granted the motion of the S. E. C. to intervene, and dismissed the action as being a forbidden collateral attack on the reorganization decree. On appeal this court affirmed the dismissal for the reason given by the trial judge, and also on the ground of *res judicata*, *Nichols* v. *Long Island Lighting Co.*, 207 F. 2d 931 (2 Cir., 1953). Attempts by the present plaintiffs to compel the S. E. C. to receive testimony on the charges of fraud in the reorganization were dismissed by Judge Inch, following which we reaffirmed our previous holding on petition to amend, 211 F. 2d 392 (2 Cir., 1954), cert. den. 348 U. S. 827, pet. for rehearing den. 348 U. S. 884.

The present action against officers, directors and agents of the predecessor corporation was begun late in October, 1954. The allegations of the complaint are almost identical to those contained in the complaint filed against the reorganized corporation in 1952, and it is obvious that the plaintiffs seek to avoid the conclusive effect of that and other prior adjudications by the device of shifting defendants.

Appendix A

The complaint in this action charges that an alleged conspiracy of the defendants, or some of them, defrauded the plaintiffs of the greater portion of their interest in the Long Island, vested in them pursuant to the 1944 plan of recapitalization, by carrying through the following steps of the conspiracy: (1) inducing the S. E. C. to institute federal court proceedings to prevent the imminent consummation of the 1944 plan and enjoin its enforcement;[5] (2) waiving the exemption of the Long Island from the Public Utility Holding Company Act of 1935, 15 U. S. C. § 79 *et seq.* ("P. U. H. C. A.") thereby submitting the Long Island to the jurisdiction of the S. E. C.;[6] (3) inducing the Long

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[5] On November 10, 1944, the S. E. C. instituted proceedings under Section 3(c) of the P. U. H. C. A., 15 U. S. C. § 79c(c), to determine whether the exemption granted to Long Island should be revoked or modified. While the revocation proceedings were in progress before the S. E. C., the S. E. C. instituted an action in the Eastern District to restrain the Long Island from taking any further steps to consummate the 1944 plan pending a determination by the S. E. C. of the issues involved in the revocation proceeding. The Eastern District held that it had no power to grant the requested relief, *S. E. C.* v. *Long Island Lighting Co.*, 59 F. Supp. 610 (E. D. N. Y., 1945), and this court affirmed, 148 F. 2d 252 (1945), with one judge dissenting. The majority decision was later overruled by us in *West India Fruit & Steamship Co.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775 (2 Cir., 1948).

On April 21, 1945, after hearings, the S. E. C. entered its order revoking the Long Islands exemption from the P. U. H. C. A. and bringing its reorganization within the jurisdiction of the S. E. C. *Long Island Lighting Co*, 18 S. E. C. 717.

[6] On April 23, 1945, in compliance with the order of the S. E. C., the Long Island registered as a holding company under the P. U. H. C. A. The jurisdiction of the S. E. C. over the Long Island was contested by the common stockholders before the Eastern District and this Court. It was held that the S. E. C. did have jurisdiction over the Long Island. *In re Long Island Lighting Co.*, 89 F. Supp. 513, 518-519, aff'd 183 F. 2d 45, 48.

Island to file a plan of reorganization with the S. E. C., which, if adopted, would destroy all but a nominal part of the plaintiff's interest in the Long Island; and (4) inducing the S. E. C. and the federal courts by misrepresentation, fraud and concealment to approve this plan of reorganization,[7] thereby completing the conspiracy.

Although largely lacking in detail factual allegations, the complaint indicates several of the means employed to carry out the various steps in the alleged conspiracy: (a) *dual employment of Kadane* (employed by the S. E. C. prior to March, 1946, and by the Long Island subsequent to September, 1946); (b) *oppression of the common stockholders* by failing to call stockholders' meetings, denying the common stockholders the right to examine corporate records, and failing to give them notice of the pendency of reorganization proceedings; (c) *understatement of earnings* by misrepresenting the prospective earnings of the Long Island to the S. E. C., and concealing the true earnings of the Long Island from this court; (d) *overstatement of depreciation* by misrepresenting and concealing before the S. E. C. and the federal courts the true facts in respect to depreciation; and (e) *consideration of an offer of the Consolidated Edison Co.* for the assets of Long Island in return for debentures at "a price less than one half of the then true value."

The plaintiffs brought this action in the United States District Court for the Eastern District of New York. Jurisdiction over the action was predicated solely on diversity of citizenship of the parties. One might therefore suppose that the *Erie* doctrine would require that New York law

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[7] Claims of misrepresentation, fraud and concealment were presented to us in 1952 in the petition to reopen the reorganization proceeding filed by these same plaintiffs. We considered the charges presented at that time and denied the petition. 197 F. 2d 709, 710. See note 4, *supra.*

govern this action substantively.[8] But the primary issue involved is the scope and effect of a federal decree, and this of necessity is a question governed by federal law.

The reorganization decree here involved is immune from collateral attack. It rests on the special statutory jurisdiction conferred by §§ 11 and 24 of the P. U. H. C. A., 15 U. S. C. A. §§ 79k(e), 79r, and 79x(a) Such a decree, we think, is *sui generis*, and hence in determining its scope and effect, other adjudicated cases are not controlling. The P. U. H. C. A. provides an administrative procedure before a specialized governmental agency, the S. E. C., for the simplification of structure and consolidation of certain public utilities. The Act contains appropriate safeguards and provides that orders of the S. E. C. approving plans of reorganization shall be subject to judicial review by a United States Court of Appeals, 15 U. S. C. A. §§ 79k(b)

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[8] It now seems well estabilsed that the *Erie* doctrine applies, whatever the basis of federal jurisdiction, to any issue in a case which is governed by state law. See, e. g., *Rothenberg* v. *H. Rothstein & Sons*, 3 Cir., 1950, 183 F. 2d 524. Cf. *Wichita Royalty Co.* v. *City National Bank*, 1939, 306 U. S. 103, 107. Likewise, the *Erie* doctrine is clearly inapplicable with respect to issues governed by federal law, even if the jurisdiction of the federal court rests on diversity of citizenship. See *Sola Electric Co.* v. *Jefferson Electric Co.*, 1942, 317 U. S. 173, 176; cf. *Prudence Realization Corp.* v. *Geist*, 316 U. S. 89, 95.

Since the initial issue here is the scope and effect of a reorganization decree rendered pursuant to a federal statute by a federal court, it is unnecessary for us to consider such New York cases as *Verplanck* v. *Van Buren*, 1879, 76 N. Y. 247; *Ross* v. *Preston*, 1944, 292 N. Y. 433, 55 N. E. 2d 490; *Young* v. *Leach*, 1898, 27 App. Div. 293, 50 N. Y. S. 670; and *Burbrooke Mfg. Co.* v. *St. George Textile Corp.*, 1954, 283 App. Div. 640, 129 N. Y. S. 2d 588, which hold that under certain circumstances a judgment procured by means of a fraudulent conspiracy will not prevent a tort action against the wrongdoers by those wrongfully deprived of property interests in an *in rem* legal proceeding.

and 79x(a). In addition, the Commission may bring an action "in the proper district court of the United States" to enforce the plan and enjoin violations thereof, 15 U. S. C. A. §§ 79k(d) and (e), 79r(f). The district court in which the enforcement proceeding is brought (hereafter, the "enforcing court") is empowered to approve the plan if it finds it "fair and equitable and as appropriate. * * *" 15 U. S. C. A. § 79k(e). And both the Commission and the enforcing court "may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located." §§ 79k(d) and (e). Thus the very scheme of the Act is such that a reorganization proceeding thereunder, just as fully as a reorganization under the Bankruptcy Act, 11 U. S. C. A. § 501 *et seq.*, binds all those holding securities affected by a plan approved by the court having jurisdiction thereof.[9]

We think it plain that the jurisdiction thus conferred upon the Commission and the Court, respectively, is exclusive, and beyond reach of attack through actions of any form whatsoever brought to courts other than the enforc-

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[9] See, e.g., *Brown* v. *Gerdes*, 1944, 321 U. S. 178 (exclusiveness of jurisdiction of bankruptcy court); *Mar-Tex Realization Corp.* v. *Wolfson*, 2 Cir., 1944, 145 F. 2d 360 (power of bankruptcy court to reserve jurisdiction over debtor corporation and enjoin state court proceedings); *Evans* v. *Dearborn Machinery Movers Co.*, 6 Cir., 1952, 200 F. 2d 125 (power of bankruptcy court to enjoin state court action brought by creditor who was not scheduled and did not know of proceedings); *In re Union League Club of Chicago*, 7 Cir., 1953, 203 F. 2d 381, 386 (conclusive effect of reorganization decree as to questions which might have been raised as well as to those litigated). Several reorganizations under the Bankruptcy Act have raised issues concerning the scope and effect of a reorganization decree which are somewhat similar to those involved in the instant case: *Shores* v. *Hendy Realization Co.*, 9 Cir., 1943, 133 F. 2d 738; *National Lock Co.* v. *Hogland*, 7 Cir., 1938, 101 F. 2d 576, 583-586.

ing court. This conclusion we think is corroborated by the express grant of injunctive powers carried in the above-cited sections of the Act. The respective grants of *general jurisdiction* to the district courts contained in the Judicial Code are generally unaccompanied with express grant of power to enjoin interference with the jurisdiction involved. On that account, perhaps, judgments by courts of general jurisdiction are more vulnerable to collateral attack for fraud in their procurement. But the express grant of such power to an enforcing court under the P. U. H. C. A., like the similar provisions in the Bankruptcy Act, strongly suggests Congressional intent to immunize enforcement decrees from such attack.

We find no cases in conflict with these conclusions.[10] Indeed, the cases touching the problem most closely certainly are consistent with our view and tend to confirm our conclusions. See particularly, *In re United Gas Corp.*, D. Del., 58 F. Supp. 501, aff'd 3 Cir., 162 F. 2d 409; *Auburn Savings Bank* v. *Portland R. Co.* (Me.), 65 A. 2d 17, cert. den. 338 U. S. 831, reh. den. 338 U. S. 881; *Okin* v. *S. E. C.*, 2 Cir., 161 F. 2d 978. Cf. *In re Federal Water & Gas Corp.*, 3 Cir., 188 F. 2d 100; *General Protective Com.* v. *S. E. C.*, 346 U. S. 521, reh. den. 347 U. S. 911. And such is the purport of *S. E. C.* v. *Central-Illinois S. Corp.*, 338 U. S. 96,

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[10] The statement in *Petition of Blatchley*, 1 Cir., 1946, 157 F. 2d 894, at 898, that "It is not at all clear to us that the injunction [incorporated in the reorganization decree] in its present terms would forbid the commencement or prosecution of [tort actions by a stockholder against officers and directors of the pre-reorganization corporation]" is clearly a dictum. Cases such as *Downing* v. *Howard*, 3 Cir., 1947, 162 F. 2d 654, cert. den. 1947, 332 U. S. 818, and *Goldstein* v. *Groesbeck*, 2 Cir., 1944, 142 F. 2d 422, 154 A. L. R. 1285, cert. den. 1944, 323 U. S. 737, are distinguishable since they involve the different question of whether the violation of provisions of the P. U. H. C. A. by management officials creates a statutory liability.

that even the enforcing court, on a direct petition to reopen its decree on the ground of fraud in its procurement, could go no further than to vacate its decree (or perhaps so much of its decree as approved the treatment of common stock) and remand the plan to the S. E. C. for further consideration.

Practical considerations support this conclusion. Simplification or consolidation proceedings under the P. U. H. C. A. are *in rem* proceedings involving a multiplicity of parties. The enforcing court becomes familiar with the parties and the issues involved, and for this reason the parties participating in the reorganization should have some protection from harassing actions brought before various other tribunals.

The plaintiffs contend that this action is not a direct or collateral attack on the reorganization decree—they contend that it is an independent tort action seeking only damages from individual officers, directors, and other individuals as distinguished from a reallocation of the corporate securities amongst the several classes of security holders. This contention, however, will not withstand analysis. Although in form an independent action for damages, this action in effect is one to obtain for the common stock of Long Island a more favorable treatment than that provided by the decree in the reorganization proceedings. This is so because it will necessarily involve the litigation of matters within the sole competence of a specialized administrative agency (the S. E. C.) and because it depends upon rights extinguished by the reorganization decree.

The plaintiffs' complaint inescapably rests on the assertion that they received less in the reorganization proceed-

ings than they thought they were entitled to receive.[11] The only allegations of the complaint which venture any detail as to the alleged conspiracy make it quite clear that

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[11] The defendants are alleged to have initiated their conspiracy by inducing the S. E. C. to institute federal court proceedings to prevent the imminent consummation of the 1944 plan and enjoin its enforcement, and by waiving the exemption of the Long Island from the P. U. H. C. A., thereby submitting the Long Island to the jurisdiction of the S. E. C. However, such acts would not be tortious even had they occurred as alleged.

The S. E. C. had power to exempt the Long Island from the provisions of the P. U. H. C. A., 15 U. S. C. A. § 79c. Such exemption was subject to revocation or modification, after notice and opportunity for hearing, in the event of changed circumstances. 15 U. S. C. A. § 79c(c). See *Long Island Lighting Co.*, 1 S. E. C. 345. The S. E. C. concluded, after an appropriate notice and hearing, that the exemption previously granted to the Long Island should be withdrawn. *Long Island Lighting Co.*, 18 S. E. C. 717. Accordingly, the S. E. C. assumed jurisdiction over the assets of the Long Island and the reorganization proceedings of which plaintiffs complain were commenced. Jurisdiction of the S. E. C. over the Long Island was based on the interstate distribution of Long Island's securities. The plaintiffs below do not contend that the S. E. C. was misled into accepting jurisdiction of the Long Island by fraudulent and erroneous statements as to the interstate distribution of Long Island's securities. Thus it appears uncontested that the securities of the pre-reorganized Long Island *were* distributed in interstate commerce, and that, therefore, neither the S. E. C. nor anyone else acted improperly in taking or suggesting such jurisdiction. For we have held that, under such circumstances, the S. E. C. had jurisdiction over the Long Island. *Common Stockholders Com.* v. *S. E. C.*, 2 Cir., 183 F. 2d 45, 47-48, aff'g 89 F. Supp. 513, 518-519. Cf. *Halsted* v. *S. E. C.*, App. D. C., 182 F. 2d 660; *Public Service Comm'n* v. *S. E. C.*, 2 Cir., 166 F. 2d 784.

Further, it appears from the opinions of this Court that the management of the pre-reorganized Long Island did, in actual fact, contest the jurisdiction of the S. E. C. and the power of the S. E. C. to enjoin the Long Island from consummating the 1944 plan. *S. E. C.* v. *Long Island Lighting Co.*, E. D. N. Y., 1945, 59 F. Supp. 610, aff'd 2 Cir., 1945, 148 F. 2d 252, remanded because moot 325 U. S. 833. Once the S. E. C. had revoked the Long Island's exemption, the management of the Long Island did not act im-

if the allegations be taken as true a fraud was perpetrated by the defendants upon the S. E. C. and the federal courts by the obtaining of Commission and court approval of the

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properly in filing a registration statement as required by the Act. 15 U. S. C. A. § 79e. Failure to register might have subjected the officers and directors to the sanctions contained in the Act. 15 U. S. C. A. § 79z-3.

We conclude that the allegations concerning the taking of jurisdiction by the S. E. C. and the "waiver of exemption" by Long Island cannot be the basis for a tort recovery. Certainly an interested group of stockholders or creditors can suggest to the S. E. C. that it revoke an exemption previously granted to a public utility without creating tort liability. It is only to be expected that groups of shareholders and creditors will advance positions to regulatory bodies which are favorable to themselves, and there is nothing wrongful about their so doing. Absent any allegations to the effect that the S. E. C. was fraudulently induced to exert a jurisdiction over the Long Island which, in actual fact, *did not exist*, the complaint does not show that the plaintiffs have been wronged in this regard. For, as we have held, the S. E. C. *had* jurisdiction over the Long Island, and to assert that the defendants are liable in tort because they brought that jurisdiction to the attention of the S. E. C. is virtually equivalent to asserting that the S. E. C. has wronged the plaintiffs by exercising a jurisdiction over the Long Island which Congress has seen fit to give the S. E. C. The plaintiffs appear to be unaware of the fact that federal legislation, when constitutional, is paramount to state legislation, and that Congress, by creating a statutory scheme of simplification and consolidation applicable to public utilities selling their securities in interstate commerce, could rightfully deprive the plaintiffs of advances which would otherwise be available to them under the law of New York. *Public Service Commission* v. *S. E. C.*, 2 Cir., 166 F. 2d 784.

The result is that the only allegations of the complaint which assert acts on which a tort recovery might be predicated are those stating, in substance, that the plan of reorganization was obtained, approved, and confirmed by means of fraud practiced on the Commission and the federal courts by the defendants. This analysis plainly reveals that the real complaint of the plaintiffs is that the reorganization decree fraudulently diminished their interest in the Long Island. This is an assertion that, were it not for the fraud practiced on the Commission and the courts by these defendants, the plaintiffs would have received a far larger share in the assets of the reorganized Long Island.

reorganization.[12] In order for the plaintiffs to recover in this action, they must prove that they suffered damage because the reorganization decree was fraudulently procured. This would amount to a showing that: (a) the conspiracy of the defendants effected a fraudulent disposition of the assets of the Long Island, and (b) if such fraudulent disposition had not occurred, the S. E. C. would have given the plaintiffs exactly as much as the Public Service Commission of New York had rather unwillingly agreed to allow them.[13] We think it obvious that both of these matters should not be litigated in courts other than the enforcement court provided for by the P. U. H. C. A., and that in *that* court the proceedings should be by direct rather than collateral attack.

Moreover, damage to the plaintiff is an essential element of a tort action for fraud. The only damages asserted in the instant action are such as pertain to the plaintiffs

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[12] Specifically: (1) The allegations concerning the dual employment of Kadane carry the clear inference that Kadane was corrupted by the promise of a high position with Long Island, and that in his capacity as an official of the S. E. C. and later as an employee of Long Island, he induced the S. E. C. to adopt the plan of which plaintiffs complain, and helped perpetrate a fraud upon the enforcing and reviewing courts. (2) The allegations of concealment and misrepresentation concerning the actual and prospective earnings of Long Island and concerning depreciation indicate that the approval of the plan by the S. E. C. and by this Court was tainted with fraud. There is a specific allegation that defendants Elbert, Barrett, Olmstead, and Booth "knowingly gave misleading testimony * * * in furtherance of * * * the conspiracy." (3) The repeated allegations in this and prior proceedings of oppression of common stockholders are made in such broad terms that, if believed, the proceedings confirming and enforcing the plan would have denied the plaintiffs due process of law.

[13] See note 11 *supra*. The reluctance of the New York Public Service Commission in approving the 1944 plan is obvious from the portion of its report quoted in note 2 *supra*.

below as holders of the pre-reorganization common stock. The decree provided that "all rights, interest and claims of the common stockholders of Long Island Lighting Company * * * *shall cease and determine*" except as provided for in the plan. It follows that the instant action, in that it depends upon the pre-reorganization value of the common stock, is one seeking to assert a right extinguished by the decree. This is so even though the recovery sought is only from the named defendants without involving any adjustment of the treatment afforded by the plan to other classes of security holders. Thus necessarily the action is in derogation of at least one important feature of the plan and violates the injunction against interference with the decree in the reorganization proceedings.

Accordingly, we think that the action was rightly dismissed. But we prefer to predicate the dismissal upon the grounds that the instant action was brought in violation of the injunction in the reorganization decree and constituted an attack on that decree not permissible under the P. U. H. C. A. We hold that through the device of an apparently independent tort action the plaintiffs below may not bypass the Commission and the enforcement court in an effort to alleviate their treatment under the plan approved by the reorganization decree.

This, of course, is not to say that the reorganization decree was immune from direct impeachment for fraud in its procurement. Under F. R. C. P. 60(b) a direct motion to the enforcement court afforded a remedy to the plaintiffs below. And perhaps this action, since it invoked the general jurisdiction of the same court, which in the exercise of its jurisdiction under the P. U. H. C. A. entered the enforcement decree, might have been treated as a motion under F. R. C. P 60(b) seeking at least a partial reopening of the earlier decree on the ground of alleged fraud. But these very plaintiffs in 1952 sought to reopen the reorganization proceeding on the ground that S. E. C.

approval and court enforcement of the plan of reorganization was procured by means of fraud. We considered the charges of fraud presented at that time and denied that petition "on the ground that no fraud or other basis for relief under Rule 60(b), F. R. C. P., is made to appear" (2 Cir., May 21, 1952, unreported).[14] On rehearing we again stated that "the facts alleged in the petition do not show that fraud was practiced upon the Commission, the District Court, or this Court." *In re Long Island Lighting Co.*, 2 Cir., 197 F. 2d 709, 710. We stated then that "this court has jurisdiction to set aside its judgment if the judgment was induced by fraud upon the court practiced by a party to the litigation." 197 F. 2d 709, 710. We adhere to that view.

It follows that, even had the court below treated the pending action as a direct motion for reopening under Rule 60(b), our former decision that the allegations of fraud were insufficient to justify a reopening would have constituted either a bar to reopening or an authoritative precedent for another ruling to the same effect. For the allegations of fraud contained in the complaint in this action are substantially similar to those presented in 1952,

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[14] Plaintiffs' brief indicates a misconception of this decision. It states that the petition to reopen was not within Rule 60(b), Federal Rules of Civil Procedure, "which was not available because of lapse of time" but upon the "inherent power [of every tribunal] to reopen and revise a decision induced by fraud."

To the extent that federal district courts possess such inherent power after the one year period of limitation on Rule 60(b)(1), (2) and (3), the authority for its exercise is codified in the savings clause of Rule 60(b) which states, "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified * * * or to set aside a judgment for fraud upon the court." See 7 Moore's Federal Practice ¶ 60.31, 60.36 *et seq.* (1955). *West Virginia Oil & Gas Co.* v. *George E. Breece Lumber Co.*, 5 Cir., 1954, 213 F. 2d 702. Cf. *Hadden* v. *Rumsey Products*, 2 Cir. 1952, 196 F. 2d 92.

and, to the extent that they are dissimilar or more complete, they were known to the plaintiffs and could have been presented at that time.[15] Further, we think it proper to suggest that if the plaintiffs, unless they can show further justification than that shown in their present complaints and in those heretofore dismissed, should make yet another motion for reopening to the enforcement court, an order of denial be entered accompanied by an appropriate injunctive order directed to counsel as well as to plaintiffs restraining further litigation against the reorganized company and those individuals who directly or indirectly participated in its reorganization.

Affirmed.

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FRANK, *Circuit Judge*, concurring:

I concur in the decision, but I think my colleagues travel the wrong road to reach the correct conclusion.

1. Of course, the "enforcing court" (i.e. the court which enforced the S. E. C. order approving the plan) had exclusive jurisdiction of everything relating to the plan and to the allocation of the assets of the reorganized company, i.e. the allocation of securities issued pursuant to the plans. Of course, too, that court's injunction prohibited the plaintiffs from taking any steps whatever, except in the enforcing court, to obtain a larger share of the assets of that company. For that reason, among others, this court held that a previous suit by plaintiffs, against the reorganized company itself, could not be maintained. See 207 F. (2d) 931 (C. A. 2), and 211 F. (2d) 392 (C. A. 2).

In the present suit, however, plaintiffs do not seek to obtain a larger share of the reorganized company's assets. Instead—precisely because the judgment of the enforcing

[15] See note 4 *supra*.

court (including its injunction) prevented their doing so—they seek damages, not from the company, but from persons who, so plaintiffs allege, wrongfully brought about that judgment. In other words, the present suit is based upon a tort consisting of the alleged harm done to plaintiffs by the wrongful conduct of the defendants. If plaintiffs were to win in the present suit, they would indeed have more than the securities allotted to them under the plan. But that added recovery would in no way diminish the assets of the reorganized company, nor would it be at the expense of the other participants in the plan. Consequently, I cannot agree that plaintiffs seek to "assert a right extinguished by the decree" in the reorganization proceedings.

I think when B, by certain kinds of fraudulent conduct, helps to bring about a judgment adverse to A in a suit by A against C, then B has committed a tort as against A, so that A may maintain an action for that tort against B. Such a tort action is not a collateral attack on the judgment adverse to A in his suit against C.[1] To be sure, it is

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[1] A asserts that B, by his fraudulent conduct, intentionally harmed A; A thus shows a prima facie tort. B must therefore defend on the ground that his conduct is immune from suit. He attempts to do so thus: "I admit, *arguendo*, that I committed the alleged fraud; but I am not liable, simply and solely because the judgment adverse to A, in his suit against C, is a bar." I think such a defense is untenable.

A judgment may be the means by which a fraudulent conveyance is accomplished. *Northern Pacific R.* v. *Boyd*, 228 U. S. 482; Glenn, Fraudulent Conveyances (1944) s. 224; Frank, Some Realistic Reflections on Corporate Reorganizations, 19 Va. L. Rev. (1933) 541. A judgment creditor of the debtor may pursue the grantees of that conveyance without attacking or disturbing the judgment. If he sues one who is not a grantee but who aided in bringing about the fraudulent conveyance, his action is one for a tort; see Glenn, Fraudulent Conveyance (1940) Sec. 56; *Phelan* v. *Middle States Oil Corp.*, 220 F. (2d) 593, 615-616 (C. A. 2); cf. *Findlay* v. *McAllister*, 113 U. S. 104, 114.

generally held that, if the wrongful conduct of B consisted solely of perjury at the trial in the suit between A and C, that wrong is not actionable; the most cogent reason for such rulings is that, on grounds of policy, the courts regard such an action, based upon such perjury, as undesirable, because the fear of such a possible action may tend to induce honest witnesses not to testify.[2] But here the plaintiffs charge the defendants with a general conspiracy—involving fraud on the S. E. C. and the enforcing court—of which perjury in the reorganization proceedings was but an incident.[3] Accordingly, I think that in bringing the present suit (1) the plaintiffs did not violate the injunction, and (2) that this suit cannot properly be dismissed on the ground that the enforcing court in the reorganization proceedings had exclusive jurisdiction of such a nature as to bar the present suit.

2. The correct basis for dismissing the complaint is, I think, the following: In the reorganization proceedings—including those in the enforcing court and on appeal from its judgment—the very facts which plaintiffs now assert were considered, and findings on those facts were made adverse to plaintiffs. See 183 F. (2d) 45 (C. A. 2), and

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[2] *Godette* v. *Gaskell*, 15 No. Car. 52, 53; *Stevens* v. *Rowse*, 59 N. H. 578; *Hocker* v. *Welti*, 239 Ill. App. 392, 397.

[3] Cf. *Robinson* v. *Missouri Pacific Transp. Co.*, 85 F. Supp. 253, 258; *Verplanck* v. *Van Buren*, 76 N. Y. 247 as interpreted in *Burbrooke Mfg. Co.* v. *St. George Textile Corp.*, 283 App. Div. 640 and in *Anchor Wire Corp.* v. *Boorst*, 102 N. Y. S. (2d) 871, 873; *Dictograph Products Co. Inc.* v. *Sonotone Corp.*, — F. (2d) — (C. A. 2, Feb. 2, 1956).

Most of those cases dealt with collateral attacks; their reasoning therefore applies *a fortiori* to a case like the instant case.

Dictograph Products Corp., Inc. v. *Sonotone Corp., supra*, disposes of the intrinsic-extrinsic fraud distinction in the federal courts, even in a collateral attack suit.

197 F. (2d) 709 (C. A. 2). Indeed, when this court decided against these plaintiffs in their suit against the company, it did so, in part, on that very ground; see *Nichols* v. *Long Island Lighting Co.*, 207 F. (2d) 931, 934, and 211 F. (2d) 392, 393 (C. A. 2). As the decision in that suit against the company did not rest on a trial at which testimony was received, it probably did not, itself, give rise to a collateral estoppel here. But we surely can and should accept it as the most reliable sort of *stare decisis* to the effect that the decision in the reorganization case did operate as a collateral estoppel as to the facts which plaintiffs now allege.[4]

Most of the present defendants were, I think, sufficiently "in privity" with the company, and with others opposed to the present plaintiffs in the reorganization proceedings, so that the findings in the reorganization proceedings constitute a collateral estoppel which precludes this suit.[5]

As to the others, the district judge dismissed the complaint, as a sham pleading, on the basis of facts stated in the defendant's affidavits and facts appearing in the record of the reorganization proceedings. Those statements of fact flatly denied, as to these defendants, the allegations of the unsworn complaint. In effect, as to these defendants, the judge entered a summary judgment. Plaintiffs filed no counter-affidavit disputing the facts as asserted in the affidavits and appearing in the record. Since those facts were not at all peculiarly within the knowledge of the defendants, I think inapposite the doctrine enunciated in

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[4] *Lawlor* v. *National Screen Service*, 349 U. S. 322, 326.

[5] See, *e.g.*, Judge Goodrich's concurring opinion in *Bruszewski* v. *U. S.*, 181 F. (2d) 419, 423 (C. A. 3); *Adrianse* v. *U. S.*, 184 F. (2d) 968 (C. A. 3).

such cases as *Subin* v. *Goldsmith*, 224 F. (2d) 755, 757-761 (C. A. 2); and in *Alvado* v. *General Motors*, —— F. (2d) —— (C. A. 2, Feb. 8, 1956).

My colleagues in footnote 11 of their opinion say that, since the complaint lacks allegations "to the effect that the S. E. C. was fraudulently induced to exert a jurisdiction over the Long Island which, in actual fact, *did not exist*, the complaint does not show that the plaintiffs have been wronged in this regard." To that extent, my colleagues justify a dismissal on the merits. I incline to agree. But my colleagues do not rest their decision on that ground.

Appendix B

(Opinion of Galston, *D. J.*)

In this action the plaintiff, on behalf of himself and other stockholders of the Long Island Lighting Company similarly situated, alleges in effect that the defendants conspired for the purpose of destroying the rights of the plaintiff and other stockholders similarly situated by causing the Securities and Exchange Commission to institute proceedings in the federal courts to enjoin enforcement of a so-called 1944 Recapitalization, approved by the Public Service Commission of the State of New York; that as part of the alleged fraud, the defendants induced the Long Island Lighting Company to file a plan of reorganization with the Securities and Exchange Commmission to the damage of the interest of the plaintiff and those whom he alleges he represents. The plaintiff and those similarly situated, so the plaintiff alleges, sustained damages in the amount of fifty million ($50,000,000) dollars, with interest from October 24, 1950.

The filing of this complaint led to the present motions which are now before me for decision. One is by the defendant Percival E. Jackson for an order pursuant to Rule 11 of the Rules of Civil Procedure to strike the complaint from the files of this court as sham and false, and to subject counsel for plaintiff to appropriate disciplinary action. A second motion, similar in kind, pursuant to Rules 11 and 12, is made by the defendant David K. Kadane.

It will be helpful to consider a prior litigation involving the Long Island Lighting Company. In 1944 that company promulgated a plan of corporate reorganization which was approved by its stockholders and by the New York Public Service Commission with certain modifications. Thereafter an appropriate certificate of reduction of capital stock was filed with the Secretary of State of New York, but the

plan was not consummated because of injunction proceedings instituted by the Securities and Exchange Commission. See Securities and Exchange Commission v. Long Island Lighting Company, 59 Fed. Supp. 610; aff'd 148 Fed. 2d 252. During the pendency of the injunction proceedings, and after public hearings, the Securities and Exchange Commission revoked the Company's exemption as a holding company under the Public Utility Holding Act of 1935. Thereafter a plan of consolidation of the Company and its operating subsidiaries was approved by the Securities and Exchange Commission and by this court. See In re Long Island Lighting Company et al., 89 Fed. Supp. 513. In this proceeding Judge Kennedy, in his opinion, made a thorough review of the historic background of the corporations involved, of the administrative proceedings and of the issues involved. Judge Kennedy's decision was affirmed, 183 Fed. 2d 45; and cert. den'd, 340 U. S. 834. Motions were made before the United States Court of Appeals for this circuit on June 5, 1952 for reargument of the order affirmed by that court in 183 Fed. 2d 45. In the per curiam opinion it was stated:

> "The alleged ground for the relief prayed for was that each of said orders was entered 'under circumstances tantamount to fraud, effected and committed by Long Island Lighting Company upon the Securities and Exchange Commission, the court below and this court' " (197 Fed. 2d 709).

These motions, therefore, were denied after a consideration of the merits.

Not satisfied with the situation as it then resulted, common stockholders, in November 1952, brought an action in this court, Nichols v. Long Island Lighting Company. Judge Inch dismissed the action, and the plaintiff appealed. See Nichols et al., 207 Fed. 2d 931. The Court of Appeals,

with Judge Augustus Hand writing the opinion, held that the Securities and Exchange Commission's order of consolidation and reorganization was final, and that the plaintiff's action for fraud was a prohibited, collateral attack upon the decree enforcing that order. See also Nichols et al. v. Long Island Lighting Company et al., 211 Fed. 2d 392; cert. den'd October 14, 1954, and petition for rehearing denied by the Supreme Court on November 15, 1954.

It is fairly clear, on the basis of documents drafted by plaintiff's attorneys in Nichols v. Long Island Lighting Company, 207 Fed. 2d 931, that the matter sought to be litigated in the present action is identical with that litigated by plaintiff in that case, and In re Long Island Lighting Company et al., 197 Fed. 2d 709.

The following passage, referring to the present action, appears in a Petition for Rehearing on a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, filed in the former case:

> "Since the denial of the petition for certiorari herein, action has begun by these plaintiffs in the United States District Court for the Eastern District, through other counsel against numerous individuals and the estate of the former general counsel for the Long Island Lighting Company, who are or were directors and officers of the Long Island Lighting Company at the time of the perpetration of the fraud and conspiracy alleged *in the complaint here and re-stated and amplified in the complaint in said action.*" (Italics mine.)

Regardless of what plaintiff now contends, it is clear that by his own admission the cause of action in the instant case and the former cases are identical in substance, if not in language, though now the damage asserted, instead of being $27,500,000, is alleged to be $50,000,000.

Appendix B

The only question left in determining whether the matter here is res judicata is that of parties. During the course of the hearing, and in the oral argument on the Jackson motion, the plaintiff conceded that the critical allegations of the complaint related to issues that were res judicata. His contention was that the doctrine of res judicata was not applicable in these circumstances because the defendants named were not the defendants in the prior litigations, and that there was no privity between the defendants in this litigation and the Long Island Lighting Company, the sole defendant in the prior litigation. The plaintiff is undoubtedly the same, and we are faced only with the problem of the defendants.

The defendants in the present action can be broken down into several groups:

(1) persons alleged to have been officers of the Long Island Lighting Company

(2) persons alleged to have been directors

(3) agents of the company

(4) members of and counsel of a preferred stockholders' committee

(5) David K. Kadane, formerly of the Securities and Exchange Commission, and now General Counsel of the Company.

All these groups and Kadane, who stands alone, are mentioned in the former complaint and affidavits. In paragraph six of the former complaint in Nichols v. Long Island Lighting Company, supra, the allegation appears that the corporation "acting through its officers, directors, attorneys and agents * * * conspired with certain preferred stockholders". The Aron affidavit in opposition to a mo-

tion for summary judgment in that action alleges that Kadane was a party to the alleged "conspiracy".

A corporation is not an empty shell. It acts through its officers, directors and agents. Litigation involving alleged fraud and conspiracy by a corporation would be res judicata in favor of such persons who conducted its affairs and determined its policies if the plaintiff failed in an action against the corporation to prove the existence of the fraud or conspiracy.

It must also be recognized that the application of res judicata no longer stands on absolute identity or privity of the parties. In Bruszewski v. United States, 181 Fed. 2d 419, the court said:

> " • • • where, as in this case, res judicata is invoked against a plaintiff who has twice asserted essentially the *same claim against different defendants,* courts have • • • enlarged the area of res judicata beyond any definable categories of privity between the defendants." (Italics mine.)

See Riordan v. Ferguson, 80 Fed. Supp. 973; Liberty Mutual Ins. Co. v. George Colon & Co., 260 N. Y. 305. In Restatement of the Law, Judgments, page 389, Sec. 83, it is said that the general rule is:

> "A person who is not a party, but who is in privity with the parties in an action terminating in a valid judgment, is, to the extent stated in Sec's 84-92, bound by and entitled to the benefits of the rules of res judicata."

If the contention is that Rule 12 is not available, on the motion made by Kadane to dismiss the complaint on the ground that no answer has been filed and res judicata must be raised by defense, the contrary follows from the case

of Hartman v. Time, Inc., 166 Fed. 2d 127. The Hartman case was followed by Bloomfield Ave. Corporation v. Montclair Manufacturing Co., Inc., 90 Fed. Supp. 1020.

All that remains, therefore, is to reiterate the holding of Judge Hand in 207 Fed. 2d 931, that the proceedings in review of the consolidation plan act as a complete bar to the plaintiff's claim of fraud. He wrote:

> "* * * the plaintiffs strenuously opposed the approval of the plan in those proceedings and at that time presented most of the claims made here. They have not presented us with any new claims of fraud that were not known at the time of our decision on the motion to reopen the order in 1952. (197 Fed. 2d, 709). While the claims made here may sound in tort, they are really the same claims heretofore litigated and determined by us against the plaintiffs.
>
> "For the foregoing reasons we affirm the order of dismissal * * * because our prior decisions are res judicata and as such a bar to the present action."

In sum, it may not be an understatement to infer from the circumstances that have been related that the complaint charges a conspiracy against these defendants to accomplish a result which has been approved by this court and the Court of Appeals.

In the matter of jurisdiction, the failure of the plaintiff to allege the citizenship of each defendant should lead to a dismissal of the complaint for want of jurisdiction. See the careful reveiw in Indemnity Insurance Co. of North America v. Pan-American Airways, 57 Fed. Supp. 980. If this were the only jurisdictional defect it could be cured doubtless by amendment. But an amended complaint could not cure the critical issue of res judicata. There must come an end of litigation. The present complaint, as has

been stated, rests on the charge of fraud and conspiracy. Those matters were effectually disposed of in prior litigation, and it is with some concern that one finds them here repeated.

The complaint may also be criticized for its misstatement of facts. On the basis of public records, during the years 1944, up to and including 1950, Dougall C. Fraser, John Vannek, Samuel Housman, Lee P. Slack, Albert F. Tegen and Laurence M. Marks were neither officers nor directors of the Long Island Lighting Company.

Again the complaint alleges that for the purpose of undoing the proposed State re-capitalization plan, the Langley Committee entered into negotiations with David K. Kadane at a time when the latter was employed by the Securities and Exchange Commission. The fact is that that committee did not come into existence until 1948, and according to the records of the Securities and Exchange Commission, Kadane was separated from its staff on March 29, 1946.

Another misstatement in the complaint is that the defendant Elbert is accused of knowingly giving misleading testimony in the reorganization proceedings before the Securities and Exchange Commission. If the draftsman of the complaint, or Berenson, a member of the firm of plaintiff's attorneys of record who signed the complaint, had consulted the transcript of the proceedings of the Securities and Exchange Commission, he would have found that Elbert had not testified before the Commission during the reorganization proceedings.

The complaint alleges that the action is brought on behalf of twenty-five hundred common stockholders of the Long Island Lighting Company, and that the plaintiff was duly authorized by those stockholders holding upwards of 750,000 shares of its common stock "to act for and repre

sent them, and to act as agent, attorney, and transact for and in the name of said stockholders any actions and proceedings relating to such stock and in any court, none of which authorizations have, to the best of plaintiff's knowledge and belief, been revoked or withdrawn". In the light of the statements which accompanied the solicitations for these authorizations, it would seem that such authority did not encompass the bringing of an action such as this, but that on the contrary such authority was limited to the reorganization proceedings which were concluded in 1950. See letter of June 14, 1948 addressed to such common stockholders, and signed by J. Donald Halsted, B. F. Grizzle, and by E. M. Nichols, the plaintiff herein.

It is on the basis of the inaccuracies and misstatements, and the fact that the issues set up in this complaint have been decided adversely to the plaintiff, that part of the present motion seeks to have that member of the plaintiff's attorneys of record who signed the complaint disciplined pursuant to the provisions of Rule 11 of the Civil Practice Act, and to have the complaint stricken as sham.

When the Kadane motion was called for argument, following the argument on the Jackson motion, Mr. Berenson declined to argue the motion on the ground that he had not received the full five days' notice required by our rules. I suggested to him that he could put in reply affidavits to the Kadane moving papers, but that he declined to do. I was not in the slightest degree impressed by his good faith in this respect, for I find in his affidavit opposing the Jackson motion that he had been working on this case for the last six months.

From what has been said above, the complaint will be dismissed, and stricken from the files as sham.

In respect to that part of the motion which seeks to have counsel disciplined, attention is called to Rule 5 of

the rules of this court which sets forth that the chief judge of the court shall have charge of all matters relating to the discipline of members of the bar. In consequence the motions before me are decided to the extent noted; but that part of the motion to discipline the attorney is denied. The latter denial, however, is without prejudice to the institution of proceedings comformable to the provisions of Rule 5. Settle orders.

CLARENCE G. GALSTON,
U. S. D. J.

Appendix C

[COPY]

(Extract from Affidavit of Harold G. Aron)

HAROLD G. ARON, being duly sworn, deposes and says:

I am and have been since its organization in 1948 General Counsel for the Committee of the Common Stockholders of the Long Island Lighting Company. I did not appear and did not act as attorney for the plaintiffs-appellants in the Court below, for reasons there stated, namely, that I did not choose to conduct litigation in which I would necessarily be a witness. After the decision and opinion of Judge Galston, on the motion for summary judgment, and to dismiss the complaint, the then attorneys for the plaintiffs quit, without consultation, or consent of their clients, thereby forcing me to take over the litigation.

* * *

HAROLD G. ARON.

[COPY]

(Notice of Motion)

Sirs:

PLEASE TAKE NOTICE that, upon the annexed affidavit of Ennis M. Nichols, duly sworn to on the 1st day of May, 1956, the undersigned will move this Court, on the 14th day of May, 1956, at 10:30 A. M., for an order

1. Directing these defendants to answer the allegations of the complaint herein.

2. Directing the United States District Court for the Eastern District of New York, with all convenient speed, after the filing of said answers, to proceed with trial by jury of the issues presented by the pleadings.

3. Exercising the full inherent and equitable power of the Court to correct, without limitation of time, scope or method "its own errors and mistakes" and to "revise a decision induced by fraud."

4. Granting such other and further relief as may be just and equitable in the premises.

HAROLD G. ARON,
Attorney for Plaintiffs-Appellants,
Madison, Connecticut.

Dated, New York, N. Y.
May 4, 1956.

[COPY]

(Affidavit of Ennis M. Nichols)

DISTRICT OF COLUMBIA
UNITED STATES OF AMERICA } ss.:

ENNIS M. NICHOLS, being duly sworn, deposes and says:

This petition is based on the findings and the conclusions stated in the opinions of this Court filed herein on February 14, 1955.

The Court there said:

> "The only allegations of the complaint which venture any detail as to the alleged conspiracy make it quite clear that if the allegations be taken as true a fraud was perpetrated by the defendants upon the S.E.C. and the federal courts by the obtaining of Commission and court approval of the reorganization."

Appendix C

This statement contains a footnote which reads as follows:

> "Specifically: (1) The allegations concerning the dual employment of Kadane carry the clear inference that Kadane was corrupted by the promise of a high position with Long Island, and that in his capacity as an official of the S.E.C. and later as an employee of Long Island, he induced the S.E.C. to adopt the plan of which plaintiffs complain, and helped perpetrate a fraud upon the enforcing and reviewing courts. (2) The allegations of concealment and misrepresentation concerning the actual and prospective earnings of Long Island and concerning depreciation indicate that the approval of the plan by the S.E.C. and by this Court was tainted with fraud. There is a specific allegation that defendants Elbert, Barrett, Olmstead and Booth 'knowingly gave misleading testimony * * * in furtherance of * * * the conspiracy.' (3) The repeated allegations in this and prior proceedings of oppression of common stockholders are made in such broad terms that, if believed, the proceedings confirming the enforcing the plan would have denied the plaintiffs due process of law."

Later, the opinion says:

> "* * * We stated then that 'this court has jurisdiction to set aside its judgment if the judgment was induced by fraud upon the court practiced by a party to the litigation.'"

At page 737, this Court said in its opinion:

> "This would amount to a showing that: (a) the conspiracy of the defendants effected a fraudulent

> disposition of the assets of the Long Island, and (b) if such fraudulent disposition had not occurred, the S.E.C. would have given the plaintiffs exactly as much as the Public Service Commission of New York had rather unwillingly agreed to allow them."

This petition is being filed on the advice of counsel and awareness of the following statement in the opinion:

> "* * * Further, we think it proper to suggest that if the plaintiffs, unless they can show further justification than that shown in their present complaints and in those heretofore dismissed, should make yet another motion for reopening to the enforcement court, an order of denial be entered accompanied by an appropriate injunctive order directed to counsel as well as to plaintiffs restraining further litigation against the reorganized company and those individuals who directly or indirectly participated in its reorganization."

It is being filed for the following reasons:

I. The statement in the opinion that "in the reorganization proceedings * * * the very facts which plaintiffs now assert were considered and findings on those facts were made adverse to plaintiffs" is completely untrue.

II. On the application to this Court, made in 1952, to reopen the reorganization proceeding, this Court did not have before it or consider any allegation of conspiracy; none such had been made; the facts thereof were then unknown to these plaintiffs-appellants and their counsel. I am advised by counsel that it is elementary law that a conspiracy to perform legal acts in such a manner as to accomplish premeditated injury to others constitutes an

actionable wrong. Acts which may have appeared to this Court in 1952 innocent errors as to earnings and depreciation reserves stand out in a very different light when the 1944 planned conspiracy behind them to mislead S.E.C. and the Courts is later uncovered and discovered by documentary evidence and sworn testimony of the conspirators which the opinion now traces as follows:

> "Although largely lacking in detailed factual allegations, the complaint indicates several of the means employed to carry out the various steps in the alleged conspiracy: (a) *dual employment of Kadane* (employed by the S.E.C. prior to March, 1946, and by the Long Island subsequent to September, 1946); (b) oppression of the common stockholders by failing to call stockholders' meetings, denying the common stockholders the right to examine corporate records, and failing to give them notice of the pendency of reorganization proceedings; (c) *understatement of earnings* by misrepresenting the prospective earnings of the Long Island to the S.E.C., and concealing the true earnings of the Long Island from this court; (d) *overstatement of depreciation* by misrepresenting and concealing before the S.E.C. and the federal courts the true facts in respect to depreciation; and (e) *consideration of an offer of the Consolidated Edison Co.* for the assets of Long Island in return for debentures at 'a price less than one-half of the then true value.' "

III. Nowhere in its most recent opinion or any prior opinion has this or any other court or tribunal asserted, or can it be asserted—

> (a) That these plaintiffs have ever had the vestige or pretense of a trial by Court or jury or administrative tribunal;

(b) No single witness has ever been allowed to testify as to the specifications of fraud and conspiracy, charged under oath, in the complaint.

(c) No forum has ever been afforded to these plaintiffs-appellants in which to offer documentary evidence of the fraud and conspiracy, charged under oath in the complaint and which were not discovered until after this Court affirmed the enforcement order.

(d) These plaintiffs-appellants have been denied any right to examine the defendants or to amend their complaints to meet the fallacious criticism that they did not plead evidence and sufficient detail.

IV. I am advised by counsel that nowhere in the instant opinion or in any prior opinion of this Court, is there stated a single reason sound in law, equity, or common justice, on the indisputable and provable facts in this case, had it been possible to get the truth with respect to these facts before this and the lower courts, to support the denial of the constitutional right of these plaintiffs-appellants to a normal legal procedure and trial by jury or to justify a moment's consideration of the defendants' trivial pleas of *res judicata* and estoppel, or to call for the repeated duress *per minas* to end this litigation, implied in the instant and prior opinions, of this Court and openly expressed in the opinion of the District Court in which the appeal now here was taken and which recommended that counsel be punished for contempt of court in continuing this litigation.

V. I am advised by counsel that there is no support in precedent, decision or judicial authority for the following statement of the concurring opinion as a ground for affirmance, in view of its forced admission that prior decisions on which it depends "did not rest on a trial."

"As the decision in that suit against the company did not rest on a trial at which testimony was received, it probably did not, itself, give rise to a collateral estoppel here. But we surely can and should accept it as the most reliable sort of *stare decisis* to the effect that the decision in the reorganization case did operate as a collateral estoppel as to the facts which plaintiffs now allege."

VI. I am advised by counsel that neither on argument nor in its opinions has this court indicated any consideration of the profound constitutional question which lies at the bottom of this entire litigation, namely whether with their property rights in jeopardy (and as it turned out about to be all but confiscated) an expressly "*limited participation*" in the reorganization proceeding granted them by S.E.C. as a *matter of grace, not right* constituted due process of law, as that has been clearly defined as to administrative agencies in United States Supreme Court, in opinions by Chief Justice Hughes (*Morgan* v. *United States,* 298 U. S. 468, 304 U. S. 1; *Railroad Commission of California* v. *Pacific Gas and Electric Co.,* 302 U. S. 388); by Mr. Justice Brandeis (*St. Joseph Stockyards Co.* v. *United States,* 298 U. S. 38, 73); and by Mr. Justice Cardozo (*Ohio Bell Tel. Co.* v. *Public Utilities Commission of Ohio,* 301 U. S. 292).

VII. It is impossible for me and my counsel on the closest reading and re-reading of the opinions, especially in view of this Court's findings in 1944 (148 F. 2nd, 252), to determine or inform others on what grounds we are literally thrown out of court as is obvious from the concluding paragraph of the opinion, heretofore quoted.

As a layman, I have, of course, relied on counsel to prepare this affidavit except these paragraphs for which I take full responsibility:

If this Court feels, as quoted above, that upon the repeated allegations of the stockholders "if believed the proceedings affirming the enforcing the plan would have denied the plaintiffs due process of law," why have we, the stockholders, been denied any chance to prove that they are true and must be believed?

If the statement in the opinion means what it says, that "the only allegations of the complaint which venture any detail as to the alleged conspiracy make it quite clear that if the allegations be taken as true, a fraud so perpetrated by the defendants upon the S.E.C. and the Federal Court," why has this Court assumed that they are not to be taken as true and denied plaintiffs-appellants any opportunity to prove that they are true and gone so far as to suggest reprisal on the plaintiffs-appellants and their counsel if they pursue further litigation?

I believe I am within my rights as an American citizen to allude to the truth, attributable to Lincoln, that nothing is settled until it is settled right and this case has not been settled right.

In this case, this Court has three times shifted its position and on the instant appeal the members of the sitting bench are not agreed among themselves and, on an earlier appeal, involving fees in the reorganization proceedings, this Court made the following, to me a layman, amazing statement:

> "In the case at bar all the claims are limited to services rendered after June, 1948, when the 'Committee' was allowed to intervene; and by that time we had decided that the SEC was paramount, and the Supreme Court had refused to intervene. *We may, of course, have been mistaken; but it should have appeared to Mr. Aron to the last degree unlikely that our ruling would not remain authorita-*

tive. We cannot, therefore, accept as compensable any efforts directed towards the possibility that the case would not have to be worked out in the pending proceedings." (Italics supplied.)

Is it not possible that this Court "may have been mistaken" in its whole treatment of their cause and of these plaintiffs-appellants, dubbed by their adversaries as "the tin cup Committee", since the S.E.C. denied them the right to ask an advance of five cents a share from the 3,000 stockholders from whom it held proxies for approximately on between one-fourth and one-third of all the common stock issued and outstanding?

ENNIS M. NICHOLS.

Sworn to before me this
1st day of May, 1956.

GRACE E. M. GANCE
Notary Public, D. C.
My commission expires
August 14, 1957.

FILED
JUL 7 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955

No. 147

ENNIS M. NICHOLS, individually and on behalf of other Stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company, and Common Stockholders Committee of Long Island Lighting Company,

Petitioners,

against

HARRY A. ALKER, *et al.*,

Respondents.

BRIEF IN OPPOSITION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1955

No. 1012

ENNIS M. NICHOLS, individually and on behalf of other Stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company, and Common Stockholders Committee of Long Island Lighting Company,

Petitioners,

against

HARRY A. ALKER, *et al.*,

Respondents.

BRIEF IN OPPOSITION

Opinions Below

The opinion of the District Court (A36-A44)[1] is reported at 126 F. Supp. 679 and the opinion of the Court of Appeals for the Second Circuit (A13-A35) is reported at 231 F. 2d 68. A later opinion of the Court of Appeals on a motion by petitioner which was treated by the Court as a second request for rehearing is not reported and is set out herein at pages 15 and 16.

[1] The reference is to the appendix to the petition.

Questions Presented

1. Where

(a) petitioner's charges of fraud in the entry of a reorganization and consolidation decree under Section 11(e) of the Public Utility Holding Company Act of 1935 were found baseless and accordingly overruled in the consolidation proceeding and

(b) a subsequent suit by the petitioner against the consolidated Company based on the same charges was dismissed as *res judicata* and barred by an injunction against collateral attack contained in the consolidation decree and the judgment affirmed by the Court of Appeals and certiorari denied, may a still further suit based on the same charges by the same petitioner be brought by the device of substituting as defendants individuals who had direct participation in the consolidation proceeding as his adversaries?

2. Did the courts below err in dismissing the unsworn complaint as sham when it is replete with misstatements of facts disproved without contradiction by defendants' affidavits and reference to public records?

Argument

The gravamen of this suit is petitioner's claim that he was defrauded as a result of the procurement of the 1950 decree consolidating Long Island Lighting Company and its subsidiaries under Section 11(e) of the Act. He made this same claim in 1952 based on "evidence" he had "uncovered", and petitioned to have the consolidation proceeding reopened. That petition was denied, the Court of Appeals finding that "facts alleged in the petition do not show that fraud was practiced upon the Commission, the

District Court, or this Court." 197 F. 2d 709. A subsequent suit for $27,500,000 based on the same claims against Long Island Lighting Company was dismissed as *res judicata* and as a forbidden collateral attack on the reorganization, 207 F. 2d 931; 211 F. 2d 392, *cert. denied*, 348 U. S. 827, *rehearing denied*, 348 U. S. 884. It is undisputable and found by the courts below that the instant suit for $50,000,000 is merely a reassertion of the same claims with a switch in defendants to twenty-three officers, directors, former directors, and committee members.

Judges Hincks and Waterman of the Court of Appeals held below that the proper forum in which to ascertain fraud in the procurement of the consolidation decree is the consolidation proceeding (A29). They analyze the complaint as alleging (1) that the S.E.C. was fraudulently induced to take jurisdiction over the reorganization, and (2) that in such reorganization, through fraud, the common stockholders received an inadequate allocation of the new securities (A20-A21). All three of the Judges below agreed that petitioner's position was defective as to the first point because it is not even alleged that the S.E.C. did not have jurisdiction (aside from the fact that such jurisdiction had already been sustained) (A26-A27, n. 11; A35). Judges Hincks and Waterman further held that the second point—the adequacy of the allocations—was a matter that should be left to the reorganization proceeding (A28). That only the reorganization Court should determine whether petitioner should have received more in the reorganization was held to be required by the Act (A22-A24), by the nature of the proceedings, and by practical considerations (A25). The intended result is orderly procedure: that "through the device of an apparently independent tort action, the plaintiffs below may not bypass the Commission and the enforcement Court in

an effort to alleviate their treatment under the plan approved by the reorganization decree" (A29).

Judges Hincks and Waterman further reasoned (1) that petitioner may prevail here only if he was defrauded in the consolidation proceedings (A28); but (2) that when he made these charges of fraud in that very proceeding, it was held that no basis therefor had been made to appear (A30); and that consequently, (3) there was no reason to lift the bar which the Holding Company Act, the injunction in the consolidation decree, and the very nature of the consolidation proceedings place in the path of an action predicated on the theory that the consolidation decree worked a wrong on petitioner.

Judge Frank agreed that plaintiff may prevail only if he was defrauded in the consolidation case, and he agreed that it was specifically held in the consolidation case that no fraud appeared (A33-A34); but instead of concluding that in such a circumstance a tort action for the alleged fraud would be inconsistent with the Act, the decree and the nature of the proceeding, he concluded that "the decision in the reorganization case did operate as a collateral estoppel as to the facts which plaintiffs now allege" (A34). Since Judge Frank held that most of the defendants were in privity with the Company and with others opposed to petitioner in the consolidation and that, as to the remaining defendants, the complaint was properly found to be sham (A34), he too found that the dismissal of the complaint was proper.

I

The petition discloses no sound basis for the granting of certiorari.

A. There are no constitutional questions involved.

The claim that the reorganization proceedings were brought without actual notice to the common stockholders is false. Copies of both of the proposed reorganization plans and of the S.E.C.'s notices of the hearings to be held thereon were mailed to each stockholder of record prior to the hearings thereon before the Commission in accordance with the Commission's standard practice. See Holding Company Act Releases Nos. 6218 (November 9, 1945) and 8032 (March 11, 1948) and *Matter of Long Island Lighting Company*, S.E.C. File No. 54-136 (Transcript of Hearings of December 11, 1945 at pp. 20-22 and of April 7, 1948 at pp. 2296-2297).[2]

Contrary to his assertion (pp. 11 and 12) that petitioner has been denied trial of his claims, petitioner's claims have repeatedly been examined and found wanting (A30; A33-34) and even now the door is open to reopen the reorganization if there is any new material showing fraud (see opinion of Court of Appeals, p. 16, *post*).

B. There is no conflict among the Courts of Appeals for the various circuits.

The Court below said "We find no cases in conflict with these conclusions. Indeed, the cases touching the problem most closely certainly are consistent with our view and tend to confirm our conclusions" (A24). Thus petitioner's statement that *Petition of Blatchley*, 157 F. 2d 894, "is admittedly in conflict with decisions of other Courts of Appeals" (p. 10) (note the plural) is plainly false.

The conflict petitioner finds with *Blatchley* is too tenuous. Blatchley applied to the Court of Appeals for the 1st Circuit for leave to file a petition for a writ of mandamus, directed to the District Judge, ordering him to remit a bill

[2] If petitioner did not receive notice of the reorganization proceedings it was because he did not become a stockholder of record until June, 1948. This fact, which is not part of the record herein, appears in the records of the Company's transfer agent.

of review to the S.E.C. to take testimony and make recommendations with respect to possible modification of the Commission's findings on a previously approved reorganization plan. Blatchley had regarded himself as prevented from pursuing his charges of fraud because of an injunction issued by the District Court in enforcing the reorganization plan. The Court said:

> "It is not at all clear to us that the injunction in its present terms would forbid the commencement or prosecution of the sort of suit which Blatchley has in mind. However that may be, Blatchley has not yet asked the District Court for either a clarification or modification of its injunction. If the injunction in its present form does forbid the institution of stockholders' suits seeking an accounting from the alleged wrong-doers, the district court is at liberty to make an appropriate modification of the injunction" (157 F. 2d at p. 898).

In the instant case, the Court of Appeals was thus correct in concluding that the first sentence of the above quotation is no more than dictum, as the context of the sentence shows. Furthermore, the *Blatchley* Court had done no more than state that the answer to the question was not clear; and under the Court's disposition of the matter, no answer was required to be made. Moreover, in the case at bar petitioner has already raised his issues in the reorganization proceedings, and lost on the merits.

C. The decision below is not in conflict with any fundamental rules of law, nor does it present any question of novelty or importance which must be settled by this Court. As a matter of fact, questions arising under Section 11(e) of the Holding Company Act have become of little importance as the Commission's work under this section has considerably lessened and is nearing comple-

tion (see 18th Annual Report of S.E.C. (1952), p. 82 and 19th Annual Report of S.E.C. (1953), p. 52).

D. The decision below is clearly sound. The basis of the decision of Judge Hincks and Waterman is correct not only for the reasons given by them, but also for the following reason: petitioner can show damages only if the plan was unfair to him regardless of his charges as to how the decree was obtained; but since it has been conclusively held in the consolidation case after examination of all the facts (and of petitioner's charges) that the plan was fair to him, he would not be able to show any damages.

The theory of Judge Frank's decision based on collateral estoppel is also sound, not only for the reasons given by him but also because of the decision in *Stoll* v. *Gottlieb*, 305 U. S. 165. There a reorganization plan under Section 77(b) extinguishing certain guarantees by individuals was confirmed over the objections of creditors of the same class as Gottlieb, who did not appear in the proceedings. Gottlieb then sought unsuccessfully to reopen the reorganization. His later action against individual guarantors on the guarantee was held to be barred, the Court stating that in the absence of fraud the earlier determinations were conclusive. Here it has also been held in the reorganization proceedings that the charges of fraud are groundless and these determinations are entitled to the same credit.

The distinction between the theory of Judges Hincks and Waterman and that of Judge Frank is largely verbal. All three Judges agree that a litigant who makes charges of fraud in a Section 11(e) reorganization proceeding and loses on the merits may not re-litigate those same charges by substituting as defendants individuals who had direct participation in the reorganization proceeding.

II

The complaint was properly dismissed as sham and there is, therefore, no need to consider any of the questions raised by petitioner.

Petitioner overlooks completely that the District Court found that the complaint was sham and ordered it stricken (A43), and that this determination was affirmed by the Court below (A31). This is a case where the allegations of the unsworn complaint, which charges wrongdoing in a reorganization tantamount to criminal activity, have, since the reorganization, been repeatedly found wanting in judicial proceedings (A33-A34) (twice in the District Court, seven times in the Court of Appeals and three times in this Court) and where the matters alleged to lend new color to the stale claims have been shown to be scandalous and palpably false by reference to public records. The disclaimer of knowledge of the alleged conspiracy (p. 5) is itself sham; it is belied by the record which petitioner, through Mr. Aron, his present counsel, made in 1949 as a member of the Common Stockholders' Committee in the reorganization proceedings[3] and in the many briefs thereafter filed by him in subsequent proceedings, including those in this Court, in petitioner's vendetta against the consolidation plan.[4]

---

[3] In those proceedings petitioner charged that the reorganization was a "scheme" foisted upon the common stockholders by a "management cabal" and illustrated the truth of the adage "What a tangled web we weave when first we practice to deceive!" Brief of Common Stockholders Committee dated Dec. 8, 1949 at pp. iii, x, xi in *Matter of Long Island Lighting Co.* (E.D.N.Y., No. 10413).

[4] In this Court alone petitioner has filed 4 prior briefs alleging the very same oppression of common stockholders, misrepresentation of earnings and depreciation and lack of S.E.C. jurisdiction over the reorganization of Long Island Lighting Company. Petition of Common Stockholders Committee for Writ of Certiorari, dated July 24,

Indicative of the irresponsibility of the charges made here is one of the crucial allegations of the complaint on which the alleged conspiracy charge is primarily based, namely, that the Langley Committee conspired with defendant Kadane while the latter was employed by the S.E.C. The District Court found that the Committee was not organized until 1948 and that Kadane permanently left the S.E.C.'s employ early in 1946 (A42). Thus this conspiracy simply could not have taken place. Similarly, the District Court found other crucial allegations to be sham by reference to public records and the uncontradicted affidavits of defendants:

(a) Messrs. Fraser, Vannek, Housman, Slack, Tegen and Marks, made defendants on the basis of the allegations that they were officers and directors in the reorganization period ending in 1950 during which the alleged conspiracy was claimed to have been hatched, were not officers or directors in that period (A42). And in fact one of the defendants, Mr. Marks, never was an officer or director.[5]

(b) The complaint alleges that the defendant Elbert knowingly gave misleading testimony in the reorganization proceedings. The District Court found that he did not testify at all (A42).

(c) Even the allegation that petitioner represents the common stockholders in this action was found to be false (A42-A43). Unperturbed petitioner claims here to be "the common stockholders of Long Island Lighting Company" (p. 1), specified later (p. 3) as 2,500 in number.

1950, in *Matter of Long Island Lighting Co.* (Oct. Term, 1949); Petition of Ennis M. Nichols and Common Stockholders Committee for Writ of Certiorari, undated, in *Nichols* v. *Long Island Lighting Co.* (Oct. Term, 1954), Nichols' Reply Brief therein, undated (where the claimed conflict with *Petition of Blatchley* was first asserted) and Nichols' Petition for Rehearing therein, undated.

[5] Affidavit of Bertram D. Moll dated March 29, 1955, on file in the Court below.

Under such circumstances it is not surprising that the complaint was stricken as sham. Nevertheless, even in his petition in this Court, petitioner continues to make irresponsible, unfounded charges, as a partial enumeration thereof will demonstrate:

1. Petitioner claims (p. 2) he received the right to only a "limited participation" in the hearings, implying that there were rights he did not receive. He actually received the right to adduce evidence, cross-examine witnesses, file briefs and make oral argument before the full Commission—all of which he did; and in addition, he opposed the plan in Court through pleadings, arguments and briefs and took numerous appeals. The quoted phrase, therefore, gives a distorted picture of the rights accorded him.

2. It is stated at page 2 that as a result of the enforcement order "The Petitioner's interest in the reorganized company was reduced from 49.7% in the original Long Island Lighting Company to a cash distribution, equivalent to a 5.7% in the reorganized company." This is false and misleading for three reasons: first, the common stockholders received new common stock, and not cash (*Matter of Long Island Lighting Co.*, 89 F. Supp. 513, 520); second, the statement ignores the fact that the 49.7% interest in the common stock under the New York plan was junior to $15,000,000 of preferred stock and to about $10,000,000 of accumulated dividend arrears on the preferred stock which were not disturbed by the New York plan (I Annual Report of New York P.S.C. for 1944, pp. 92 *et seq.*); and third, the 49.7% interest in the New York plan was confined to an interest in Long Island Lighting Company (*Matter of Long Island Lighting Co.*, 73 P.U.R. (N.S.) 266, 271), whereas the 5.7% interest in the common stock of the consolidated Com-

pany covered not only the assets of Long Island, but also those of Queensborough Gas and Electric Company and Nassau & Suffolk Lighting Company (*Matter of Long Island Lighting Co.*, 89 F. Supp. 513, 519, 520).

3. The petition refers to "this action in which it is charged under oath" that the alleged wrongs took place (p. 2). The complaint was not sworn to (A34). On page 3 and again on page 4 of the petition it is falsely stated that the complaint was verified.

4. The petition states that there was an "admitted scheme * * * to accomplish a fraud on the petitioners" (p. 2). There never has been any such admission.

5. At pages 4 and 5 of the petition there is a lengthy quotation from an order of Judge Inch, dated January 12, 1953, denying a motion of the Company to dismiss *Nichols* v. *Long Island Lighting Company.* Petitioner does not point out that that order was not entered in the instant proceeding but rather in its immediate predecessor, *Nichols* v. *Long Island Lighting Co.;* but more importantly, he does not mention that on his own appeal from that order, it was reversed by the Court of Appeals and the Company's motion for dismissal on the ground of *res judicata* was upheld (211 F. 2d 392).

6. Petitioner states that his "limited participation" was "accorded as a matter of grace" (p. 8). This is not so. Section 11(e) of the Act permits the Commission to approve a plan only "after notice and opportunity for hearing".

7. Paragraph 8 of the petition (p. 9) attacks the earnings forecast used by the Commission because it "has since proved to be 70% below the reported net earnings." This statement fails to disclose the fact that since the consolidation was consummated $42,000,000 of preferred

stock has been sold and so much additional common stock has been sold that, together with accumulated earned surplus, the book value of the common stock has increased from $31,000,000 to more than $100,000,000.[6] This lapse has been pointed out to petitioner repeatedly in briefs in the Courts below and in the previous litigations.

8. Paragraphs 5 and 6 of the petition (p. 8) claim that the issue is whether the consolidation decree is "a complete bar to any action for fraud and conspiracy perpetrated in such proceedings" and "whether an affirmed enforcement order bars the door to newly discovered evidence of fraud and conspiracy." This is misleading because it conceals the fact that in the consolidation proceeding itself these same charges of fraud were aired and found wanting.

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[6] *Petition of Long Island Lighting Co.*, N.Y.P.S.C. Case No. 17748, opinion dated Apr. 16, 1956 at p. 7.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID K. KADANE,
Attorney for Respondents Barrett, Fraser, Hausman, Blakeslee, Carpenter, Coe, Doebler, Link, Olmsted, Crummey, Hagerty, Booth, Tegen, Koons, Miles, Langley, Elbert and Pro Se,
250 Old Country Road,
Mineola, New York.

WINTHROP, STIMSON, PUTNAM & ROBERTS,
Attorneys for Respondent Marks,
40 Wall Street,
New York, New York.

CHARLES C. LOCKWOOD,
Attorney for Respondent Vanneck,
30 Pine Street,
New York, New York.

PERCIVAL E. JACKSON, *Pro Se,*
68 William Street,
New York, New York.

DAVID K. KADANE,
PETER H. KAMINER,
PERCIVAL E. JACKSON,
BERTRAM D. MOLL,
of Counsel.

July 5, 1956.

APPENDIX

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 39—October Term, 1955

Motion Submitted May 7, 1956
Decided June 7, 1956

Docket No. 23580

ENNIS M. NICHOLS *et al.*,
Plaintiffs-Appellants,

v.

HARRY A. ALKER *et al.*,
Defendants-Appellees.

Before: FRANK, HINCKS and WATERMAN, Circuit Judges.

On appellants' motion to vacate the judgment on the ground of fraud and appellees' motion to enjoin further proceedings on the part of appellants, petitions severally denied.

HAROLD G. ARON, Madison, Connecticut for plaintiffs-appellants

BERTRAM D. MOLL, Mineola, N. Y. for defendants-appellees

PERCIVAL E. JACKSON, New York City, *Pro se.*

Per Curiam:

On February 14, 1956, we affirmed the dismissal of appellants' complaint by the District Court. A petition for rehearing was denied on March 13, 1956. Now appellants have moved for an order directing appellees to answer the complaint and for other relief. In effect this is a second petition for rehearing. The motion is untimely and presents nothing not heretofore considered by us. Appellants' motion is therefore denied.

Appellees have filed a cross motion seeking to enjoin appellants and their attorneys from taking any further steps in the within action and from instituting any further action or proceedings based on the allegations of the complaint in the within action. In our opinion of February 14, 1956, 231 F. 2d 68, we left it open to appellants, if so advised, to apply under Rule 60(b) to the enforcement court, the U. S. District Court for the Eastern District of New York, to reopen on the ground of after-discovered evidence of fraud. In order to succeed in reopening the reorganization proceeding, appellants must satisfy the trial court that they now have substantial evidence of fraud which was not obtainable by due diligence in time to present it either in the original reorganization proceedings or in the subsequent petition, filed in 1952, to reopen the reorganization proceedings; and that the petition attempting to reopen is made within "a reasonable time" as required by Rule 60. We indicated that, if such effort was made and denied, the District Court might then consider the appropriateness of enjoining further litigation. 231 F. 2d 68, 79-80. We adhere to these views. Appellees' motion for an injunction against further proceedings based on the allegations of the complaint herein is therefore denied.

SEP 5 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1955

No. [redacted] 147

ENNIS M. NICHOLS, individually and on behalf of other Stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company, and Common Stockholders Committee of Long Island Lighting Company,

Petitioners,

against

HARRY A. ALKER, ET AL.,

Respondents.

PETITIONERS' SUPPLEMENTAL APPENDIX AND REPLY TO RESPONDENTS' BRIEF

HAROLD G. ARON,
Attorney for Petitioners.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y. 13, BEEKMAN 3-2320
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PETITIONERS' SUPPLEMENTAL APPENDIX AND REPLY TO RESPONDENTS' BRIEF

Counsel for petitioners is under the compulsion of submitting this Supplemental Appendix and Brief because of the following events which have intervened since filing of the petition herein.

I. The petition was filed on the 8th day of June, 1956. Unknown to petitioners' counsel, the Court of Appeals for the Second Circuit had handed down on June 7th, 1956, the decision, copy of which is hereto annexed and marked Exhibit A.

II. Pursuant to this decision, on the 5th day of July, 1956, petitioners' counsel filed in the United States District Court for the Eastern District of New York, the petition annexed hereto and marked Exhibit B. On the 12th day of July, 1956, respondents' counsel filed a counter-motion in the original reorganization proceeding of the Long Island Lighting Company, copy of which is hereto annexed, and marked Exhibit C.

III. On the 9th day of August, 1956, petitioners' counsel addressed to the Honorable Matthew T. Abruzzo, a Judge of the Court of the Eastern District of New York, a letter, copy of which is annexed hereto and marked Exhibit D.

IV. On the 21st day of July, 1956, the Long Island Lighting Company published earning statements showing its net income for twelve months of $12,477,335 as against $3,500,000 maximum future annual net income as estimated by the Securities and Exchange Commission and on which the Court of Appeals for the Second Circuit relied in affirming in June of 1950, the enforcement order of the District Court in the reorganization proceedings under which enforcement order the common stock of the original Long Island Lighting Company representing 49 7/10% of the equity ownership of the Company received less than 6% of the new stock with a market value of about $3,000,000, which is today, five years later, 36% of the net earnings

for the past 12 months, from strictly normal and predicted growth of this public utility system. The defendant Olmstead, as financial vice president of the Long Island Lighting Company, represented to the SEC in the reorganization proceeding that the future net income of the reorganized company would not exceed $2,400,000. (Pages 202 and 209, Transcript of Record—United States Court of Appeals for the Second Circuit on appeal from the Enforcement Order of District Court.)

PETITIONERS' REPLY TO THE RESPONDENTS' BRIEF

As a member of the bar of this Court since 1920 and consequently imbued with its dignity and magnificent tradition, as well as the limitations of its functions, one shrinks from branding any briefs or documents to be considered by it as a knowingly and provably false fabrication of facts, devoid of truth and designed to derogate the functions of this great tribunal to a court of *nisi prius.*

Such, however, is the duty of petitioners' counsel in this cause.

The following statements in appellees' brief are false and misleading:

(1) The complaint was not unsworn, but was actually verified by the plaintiff, Ennis M. Nichols, before a Notary Public.

(2) Petitioners' charge is not of fraud alone, but fraud and conspiracy.

(3) Such charges were not made in the reorganization and consolidation proceedings. The facts were not discovered until long after those proceedings were irrevocably closed.

(4) Neither before SEC nor in any tribunal have such charges been even heard, much less found baseless.

(5) No decision exists except that of one judge (Galston) in the District Court of the Eastern District sustaining the plea of *res judicata.*

(6) In no court or administrative tribunal have the petitioners had the vestige of an opportunity to present *in any form* their evidence of fraud and conspiracy. No verdict, decision, opinion or findings has ever found those charges to be unsupported, baseless or untrue.

(7) When the Court of Appeals wrote its decision reported in 197 F. 2d 709, the charges of fraud and conspiracy in the complaint now here had not been presented to that Court, because the evidence to support them had not then been discovered by these petitioners.

(8) For similar reason, none of petitioners' charges now here was made or in any shape or form heard or considered in the reorganization proceeding.

(9) The Court of Appeals neither in its opinion in 231 F. 2d 68 nor its as yet unreported decision appended to this brief makes the slightest allusion to affirmance on the ground of *res judicata* or to Judge Galston's dismissal of the complaint as sham. Moreover, the recent action of the Court of Appeals is totally inconsistent with and repugnant to appellees' contention in Point II of their brief.

(10) The effort to escape the original New York reorganization, approved by its Public Service Commission began in 1944 and no actual notice of what was going on *in camera* came to the attention of the common and only voting stockholders until 1948 on petitioners' demand after they entered the SEC proceedings. Nor was any notice of any kind ever given the common stockholders of the surreptitious overnight action of the Board of Directors, approving the sale of their company, lock, stock and barrel to the Consolidated Edison Company, at a minor fraction of its value.

(11) No more flagrant untruth has been written in the artful and deceitful defense of this litigation than the statement at page 5 of appellees' brief that "petitioners' claims have repeatedly been examined, and found want-

ing." *The mendacity of such a statement in this high tribunal is answered by a single word "WHERE?"*

That this gross deception is not unintended, on the following page of appellees' brief (p. 6), we find it repeated:

> "Moreover, in the case at bar petitioner has already raised his issues in the reorganization proceedings and lost on the merits."

There is not a scintilla of evidence or support for this statement in the entire record of the reorganization proceeding.

Again, on the following page (7) the same deception is again attempted, commenting on *Stoll* v. *Gottlieb*, appellees' counsel state:

> "Here it has also been held that the charges of fraud are groundless."

And yet, appellees have nowhere been permitted to present their evidence, oral and documented.

(12) As to the footnote on this page, the fact is that Ennis M. Nichols became and has continued a common stockholder of LILCO since 1946.

(13) In the obvious effort to confuse, weary and disgust this Court, appellees in their Point II descend to misleading minutiae unworthy of a brief in this Court. On page 8 in the footnote, they quote petitioners' counsel and earlier briefs to show that petitioners' counsel as early as 1949 sensed that "there was something rotten in Denmark." He would have been a fool if he had not, but he has been too long at the bar and too sensitive to its obligations to make charges of conspiracy and fraud until proof thereof came into his possession which was in 1953 long after the Court of Appeals had affirmed the enforcement order.

(14) On page 9, respondents evade the documented facts as to Kadane's original employment by SEC, like-

wise in their statements as to certain defendants they name. Marks is sued as a member of the Preferred Stockholders' Committee and those defendants not directors when the conspiracy was being perpetrated are sued for their part in consummating it and rewarding the conspirators. As to the inconsequential Elbert, the records contain a 10 page printed misleading affidavit sworn to by him and submitted by the Long Island Lighting Company to the Court of Appeals on the application leading to the decision in 197 Fed. 2d 709.

(15) On page 10, appellee's counsel, most of them more than familiar with SEC practice under the Public Utilities Holding Companies Act make a completely misleading statement as to the scope of a "limited participation" and underline it with the consummate falsehood " * * * all of which he did."

(16) In the paragraph marked 2 on page 10 of appellees' brief, the statement is made, inexcusable and indefensible in a brief signed *inter alia* by LILCO's general counsel, David K. Kadane, namely that "the 49.7% interest in the common stock under the New York plan was subordinate to $15,000,000 of preferred stock" which as a matter of record in the Public Service Commission of New York just is not true.

(17) In the paragraph marked 4 on page 11, appellees' counsel garble, as the punctuation shows, the statement of the petition. That there was not only a scheme but a conspiracy to accomplish a fraud on the common stockholders by "*inventing*" a means of by-passing the Public Service Commission of New York and dissolving the Company without their knowledge or consent is established by existent admissions and testimony under oath as well as by documentary evidence.

(18) The argument on page 12 of appellees' brief, if it has any relevancy goes only to the question of petitioners' damage and is answered by anyone knowing the rudiments of corporate finance: capital does not *per se* increase

earnings. The earnings of LILCO increased because it has a franchise monopoly of the fastest growing urban and suburban territory in the United States.

(19) Adhering apparently to the Hitler philosophy of "the big lie" appellees' counsel conclude their brief on page 12 with this statement:

> "This is misleading because it conceals the fact that in the consolidation proceeding itself these same charges of fraud were aired and found wanting."

We do not find any legal meaning attributed to the word "aired" in any dictionary and again *we challenge appellees' counsel to designate any part of the record in the consolidation proceeding where petitioners' charges were ever "aired and found wanting."*

Conclusion

As to the naked statement on page 4 of appellees' brief that "There are no constitutional questions involved," we respectfully submit that the petition raises constitutional questions of the widest scope and public concern, *inter alia*:

> Can the complaint and demand for a jury trial of 2,500 common stockholders setting forth sworn and undenied allegations of fraud and conspiracy, found to have been well pleaded, be dismissed without answer, hearing or trial on motion of the defendants or, at the instance of an administrative agency of the Federal Government because the work of that agency (pp. 6 and 7) is nearing completion, *a fortiori*, when the fraud and conspiracy charged, appear *res ipsa loquitur* on defendants' sworn admission in the proceeding before the SEC and the earning statements of the Long Island Lighting Company?

Respectfully submitted,

HAROLD G. ARON,
Attorney for Petitioners.

Exhibit A

(Decision of the Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

No. 39—October Term, 1955.

(Motion submitted May 7, 1956 Decided June 7, 1956.)

Docket No. 23580

—o—

ENNIS M. NICHOLS, *et al.*,
Plaintiffs-Appellants,

—v.—

HARRY A. ALKER, *et al.*,
Defendants-Appellees.

—o—

Before:

FRANK, HINCKS and WATERMAN,
Circuit Judges.

—o—

On appellants' motion to vacate the judgment on the ground of fraud and appellees' motion to enjoin further proceedings on the part of appellants, petitions severally denied.

—o—

HAROLD G. ARON, Madison, Connecticut, *for plaintiffs-appellants.*

BERTRAM D. MOLL, Mineola, N. Y., *for defendants-appellees.*

PERCIVAL E. JACKSON, New York City, *pro se.*

Exhibit A

PER CURIAM:

On Febraury 14, 1956, we affirmed the dismissal of appellants' complaint by the District Court. A petition for rehearing was denied on March 13, 1956. Now appellants have moved for an order directing appellees to answer the complaint and for other relief. In effect, this is a second petition for rehearing. The motion is untimely and presents nothing not heretofore considered by us. Appellants' motion is therefore denied.

Appellees have filed a cross-motion seeking to enjoin appellants and their attorneys from taking any further steps in the within action and from instituting any further action or proceedings based on the allegations of the complaint in the within action. In our opinion of February 14, 1956, 231 F. 2d 68, we left it open to appellants, if so advised, to apply under Rule 60(b) to the enforcement court, the U. S. District Court for the Eastern District of New York, to reopen on the ground of after-discovered evidence of fraud. In order to succeed in reopening the reorganization proceeding, appellants must satisfy the trial court that they now have substantial evidence of fraud which was not obtainable by due diligence in time to present it either in the original reorganization proceedings or in the subsequent petition, filed in 1952, to reopen the reorganization proceedings; and that the petition attempting to reopen is made within "a reasonable time" as required by Rule 60. We indicated that, if such effort was made and denied, the District Court might then consider the appropriateness of enjoining further litigation. 231 F. 2d 68, 79-80. We adhere to these views. Appellees' motion for an injunction against further proceedings based on the allegations of the complaint herein is therefore denied.

Exhibit B

(Notice of Motion)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 14890

———o———

ENNIS M. NICHOLS, individually and on behalf of other Stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company, and Common Stockholders Committee of Long Island Lighting Company,

Plaintiffs,

against

HARRY A. ALKER, et al.,

Defendants.

———o———

PLEASE TAKE NOTICE that on the petition of Ennis M. Nichols on behalf of himself and the above named plaintiffs, the undersigned will move this Court at a motion part thereof, on the 18th day of July, 1956, at 10 A. M., or as soon thereafter as counsel can be heard, in the United States Court House for the Eastern District of New York, 271 Washington Street, Borough of Brooklyn, City and State of New York, that the Court proceed to the trial of the issues of fraud and conspiracy, as set forth in the complaint herein, as mandated by the annexed opinion of the United States Court of Appeals, for the Second Circuit on June 7, 1956, and as the said issues are more explicitly

stated in the annexed petition for certiorari herein, as filed in the Supreme Court of the United States on the 8th day of June, 1956, and already served on defendants' counsel, without knowledge by petitioner or counsel of the aforesaid opinion of June 7th.

As counsel is not informed as to any rules or practice in force or prevailing on such a mandated referral, petitioner further asks:

I. That for the aforesaid purpose, this Court issue its process to compel the presence at such trial of the following named persons for examination and taking of their testimony:

From Long Island Lighting Company: Messrs. Edward F. Barrett, David K. Kadane, Eric Doebler, Robert G. Olmstead;

From the *Consolidated Edison Company*: Messrs. R. H. Tapscott, Randall J. Laboef, H. C. Forbes, and one Delafield;

From the *Securities and Exchange Commission*: Messrs. William Duff of Duff & Phelps, George S. Munson, Lawrence M. Marks, Lee P. Stack, Milton Pollack, Jeffrey Granger, Albert E. Olson, Benjamin F. Gray, Percival Jackson, William C. Langley;

From the *Common Stockholders Committee*: Dwight Sullivan, Esq.;

From the *Creditors*: Bernard D. Fishman, Esq.;

From the *Interstate Commerce Commission*: Edward M. Reidy, Esq., or his successor in office as General Counsel of the Interstate Commerce Commission.

II. Petitioner further asks that this Court issue its process to compel the production for inspection and use as evidence on the issues herein of the following books, records, reports, correspondence and documents:

The corporate minute books of the Long Island Lighting Company regarding action taken or reported at all

meetings of its stockholders and directors for and since the year 1944 and for the same period the record reports, documents and written communications of the Consolidated Edison Company of New York; complete records of the SEC and the Federal Power Commission, including stenographic reports of all hearings before said administrative agencies having directly or indirectly to do with Long Island Lighting Company as organized prior to and since the proceedings referred to in the foregoing opinion.

III. Petitioner further asks that this Court order and direct the attorneys for the defendants to produce and deposit with the Clerk of this Court copies of all briefs, affidavits and exhibits heretofore filed herein and in the action heretofore instituted by these plaintiffs against the Long Island Lighting Company.

IV. Petitioner further asks this Court to order and direct the persons named in Paragraph No. 1 hereof to produce all correspondence between them or any of them having directly or indirectly to do with the Long Island Lighting Company during and since 1944.

V. Petitioner further asks this Court to order and direct the officers and directors of the Long Island Lighting Company to produce all registration statements and records in connection therewith filed with or presented to the SEC in connection with the offering for public sale, bonds, preferred and common stock of the Long Island Lighting Company since the affirmance of enforcement order in the proceedings referred to in the aforesaid opinion of the Court of Appeals, together with all annual reports made by the LILCO for any since the year 1944.

VI. Petitioner further asks this Court to order and direct the SEC and LILCO to produce the full and complete record of their respective employment of David K. Kadane.

Exhibit B

VII. Petitioner further asks this Court to order and direct all attorneys employed by LILCO, Con Edison, and the Preferred Stockholders Committees in the proceedings before the SEC and the PSC having to do with LILCO since 1944 to file with this Court statements of all amounts received by them as fees, disbursements or otherwise from the aforesaid companies and committees during the period stated.

VIII. Petitioner is prepared to submit to this Court, if the Court will receive the same, a statement setting forth the facts to be proved by the testimony of the persons named in Paragraph No. 1, and the documented evidence contained in the records and papers referred to in Paragraph No. 2.

Petitioner on behalf of the Plaintiffs' Committee also seeks the sanction of this Court to there being made now the solicitation for funds to carry forward this litigation which right, on the objection of LILCO and SEC, has been heretofore denied under the divided opinion of the Court of Appeals for the District of Columbia (182 Fed. 2d, 660).

(Signed) HAROLD G. ARON,
N. Y. Address: 37 Wall Street,
New York 5, N. Y.,
(Guthrie and Company.)

(Petition in Support of Plaintiffs' Motion for Trial of the Issues of Fraud and Conspiracy)

DISTRICT OF VIRGINIA
COUNTY OF ARLINGTON } ss.:
UNITED STATES OF AMERICA

ENNIS M. NICHOLS, being duly sworn, deposes and says:

I am one of the plaintiffs herein and acting chairman and member of the Committee of the Common Stockhold-

Exhibit B

ers of the Long Island Lighting Company. Prior to and at the time of the enforcement order, I was the owner in my own right of 775 shares of the common capital stock of the original Long Island Lighting Company, being certificates Nos. CDC 74191 for 25 shares, 74234 for 500 and 74266 for 25 shares, which in 1955, I exchanged for stock of the new Company because I was told, not, however, by counsel for the Committee, that under the enforcement order, my accrued dividends would be cancelled unless I then made the exchange. The Committee was organized in 1947 after one of the stockholders of the Long Isand Lighting Company had retained Harold G. Aron, as counsel upon then learning for the first time that proceedings had long been pending before the Public Service Commission and the Securities and Exchange Commission in an effort to undo the 1944 recapitalization which had been approved by the stockholders and the Public Service Commission and in effect to dissolve the Company without the knowledge or consent of its common stockholders who had the full voting power and thus to sell its assets to the Consolidated Edison Company for a small fraction of their true value. Mr. Aron advised the formation of the Committee and further advised the Committee, when organized, that in his opinion the Securities and Exchange Commission was devoid of power to subject the Company to the PUHCA and that said power and jurisdiction could not be established under the act by the consent or acquiescence of the management of the Long Island Lighting Company. Acting on such advice, the Committee had its counsel confer with the Securities and Exchange Commission, then located in Philadelphia, and with the Public Service Commission in New York. Accordingly, the Committee challenged the jurisdiction of the SEC and still maintains that the Securities and Exchange Commission was without power to reorganize the Long Island Lighting Company as a completely intra-State New York corporation and maintain this posi-

tion throughout the reorganization proceedings in which, in 1948, it was accorded, as a matter of grace, a "limited participation.'" Concerning this contention, the Court of Appeals in 1953, when dealing with the allowance of fees to counsel participating in the proceedings, said, in finding Mr. Aron's services non-compensable:

> "In the case at bar all the claims are limited to services rendered after June, 1948, when the 'Committee' was allowed to intervene; and by that time we had decided that the SEC was paramount, and the Supreme Court had refused to intervene. We may, of course, have been mistaken; but it should have appeared to Mr. Aron to the last degree unlikely that our ruling would not remain authoritative. * * *."

Confronted with the fact that the Court of Appeals had prior to its advent in the proceeding decided against this contention of the Committee, as indicated in the *ipse dixit* of Judge Learned Hand, it was clear to the Committee and counsel that the question of jurisdiction would probably eventually go to the Supreme Court and the Committee sought leave to solicit from the common stockholders it represented an advance of five cents a share to help meet the unavoidable expenses of the Committee for expert witnesses and out-of-pocket expense, not inincluding counsel fees. (By various artifices, these defendants and Long Island Lighting Company have *thus far* and for more than a decade prevented any decision by the United States Supreme Court.)

The Committee on a single printed communication to the stockholders at the time of its organization received written proxies and authorizations to represent between one-third and one-fourth of the 12,000 common stockholders of record, which proxies are in my possession and

have never been revoked as far as I know. SEC denied the Committee the right to communicate with these stockholders, from whom it held these proxies, for the purpose of making the solicitation above mentioned. The Committee appealed to the Court of Appeals in the District of Columbia and the Court divided with Judge Miller writing a strong dissenting opinion. Being without funds, the Committee was then unable to offer even a modicum of expert testimony and was limited to a single appearance of a few hours. No stockholders meeting having been had or called by the management, owning less than 1% of the Company's securities, since 1944, the Committee on the advice of counsel and pursuant to the Statute of the State of New York published a notice of stockholders meeting and endeavored to hold such meeting. Counsel for the Long Island Lighting Company threatened before the SEC hearing examiner to apply for an injunction and the Securities and Exchange Commission refused to approve the Committee's proposed proxy solicitation, naming a new Board of Directors. The Committee's counsel therefore agreed to any form of solicitation which the Commission desired and made repeated efforts to secure in some form the SEC's approval thereof. While these efforts were going on, the SEC suddenly and without prior warning handed down its findings and immediately applied for and obtained an injunction which barred any further action by the Committee. SEC then brought on the findings in an application for an enforcement order before Judge Kennedy who, in a lengthy opinion, took the position that in view of the prior opinion of the Court of Appeals on the question of jurisdiction, he was bound to issue the enforcement order, although he himself had denied an injunction earlier applied for by the SEC through David K. Kadane, as its counsel, to enjoin the putting into effect the recapitalization of 1944 approved by the Public Service Commission. The Court of Appeals affirmed his decision in a lengthy opinion by Judge Swan,

whereupon the directors, without notice to, knowledge or consent of stockholders surrendered LILCO's exemption from the Public Utilities Holding Act. When the enforcement order was appealed by the Common Stockholders Committee to the Court of Appeals, that Court in its first opinion found error and remanded the proceedings to the District Court but two or three days later, on a chamber application by SEC, without any hearing, reversed its remand of the enforcement order and affirmed the enforcement order in June, 1950. Thereafter the Committee moved in 1952 the Court of Appeals to set aside its enforcement order on the ground that the Court had been misled by representations "tantamount to fraud" by the Long Island Lighting Company, not these defendants, before the SEC as to its prospective earning power and depreciation reserve. In that application, no mention of conspiracy or fraud, other than mere allusion above stated, was included in the petition of the Committee and no allegation or charge of conspiracy or fraud of any kind had been made in the reorganization proceedings before SEC, for the simple reason that the Committee was not informed thereof and had no means of discovering the same. However, before its petition to the Court of Appeals in April 1952, a decision of the Public Service Commission of New York, in proceedings which were pending at the time, fixed a depreciation reserve of more than $3,000,000 below what the Company had claimed and on which SEC had based its findings. Likewise, before the 1952 petition to the Court of Appeals, the Company's earning statement for 1950 was reported and showed that at the time of the affirmance of the enforcement order, the Company was earning above $4,000,000 a year as against testimony given before the SEC and used as the basis of what the SEC referred to in briefs and arguments as its "informed guess" that its earnings would not exceed $3,500,000 annually—they have steadily climbed and have now reached more than three times that amount.

Exhibit B

It was not until hearings before the SEC begun about a year after the Court of Appeals had affirmed the enforcement order on fee application hearings between April 17, 1951 and February 3, 1953, that it was revealed in documents and sworn testimony that there had been a conspiracy formed in 1944 on the part of the preferred stockholders to "invent" some fictitious ground of superseding the recapitalization of 1944 before the PSC, under which the common stockholders received just short of 50% of the common stock of the recapitalized Company and to induce the seizure of jurisdiction by the SEC and reduce their participation to 5%, which conspiracy was successfully consummated in the enforcement order six years later.

Upon the discovery of the incontrovertible evidence of conspiracy, much of which is documented, and the fact that David K. Kadane's employment by the SEC appears not to have been terminated when he was retained as attorney for the Long Island Lighting Company and in view of the immense growth of the Company's earnings as predicted by it in 1947, in complete stultification of the Company's representations in the reorganization proceeding, and the SEC findings, the Committee instituted an action for fraud and conspiracy against the Long Island Lighting Company. Judge Inch denied a motion for summary judgment and to dismiss the complaint as not stating any cause of action but the SEC came to the rescue of Long Island Lighting Company, intervened in the action and brought about its dismissal upon the ground that the beginning of the action was a violation of an injunction contained in the enforcement order. The Committee then instituted the present action which encountered a plea of *res judicata* by the defendants, relying upon the foregoing dismissal of the complaint against the Long Island Lighting Company. This motion was argued before Judge Galston who not only dismissed the complaint

upon the grounds of *res judicata* but recommended that the Committee's attorneys be cited for contempt of court. The effort to have Committee's counsel punished for contempt of court had been made on behalf of the Long Island Lighting Company on three prior occasions. The Court of Appeals took four months to decide in a divided opinion that the dismissal of the complaint should be affirmed.

After this affirmance by the Court of Appeals, the Committee moved in the Court of Appeals for an order directing the defendants to answer the complaint, and for this Court to proceed to the trial with a jury of the issues of fraud and conspiracy set forth in the complaint. The action of the Court of Appeals on this motion is set forth in its opinion, attached to the notice of motion. An order was entered by the Court of Appeals in consonance with said opinion and I am informed by counsel that if a more explicit order is required by this Court, that a request therefor will be considered by the Court of Appeals, although it seems entirely clear that that Court having denied the motion to enjoin the plaintiffs from further proceedings and, having in its two most recent opinions expressed the view that they are entitled to present evidence of fraud and conspiracy that has never heretofore been received either by the SEC, this Court or any Court of Appeals, for the reason that no evidence of fraud and conspiracy was known to or discoverable by these plaintiffs until after the close of the proceedings before the SEC, after the enforcement order in the District Court and after its affirmance by the Court of Appeals therefrom. The incontrovertible fact is that the evidence and all of it which plaintiffs now desire to present, pursuant to the implied mandate of the latest opinion of the Court of Appeals, is in every sense after-discovered evidence, and has never before been offered or received in evidence before the SEC or in this or any related actions or pro-

ceeding. I challenge the defendants to deny this and their counsel to point out where in this prolonged litigation they have ever denied that such is the fact.

WHEREFORE, petitioner prays this Court to proceed to trial in accordance with the opinion on June 7th ult., of the Court of Appeals and to grant the relief prayed for herein and such other relief as to the Court may seem just and proper.

ENNIS M. NICHOLS.

Sworn to before me this
22 day of June, 1956.

HOUSTON BLANKENSHIP
Notary for the County of
Arlington, State of Virginia
My commission expires Aug. 31, 1959

(Notary Seal)

(Decision)

(Same as Exhibit A, printed herein at pages 7 to 8)

Exhibit C

(Notice of Motion)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 10413

—o—

In the Matter of

LONG ISLAND LIGHTING COMPANY, QUEENS BOROUGH GAS AND ELECTRIC COMPANY, NASSAU & SUFFOLK LIGHTING COMPANY.

—o—

Sir:

Please take notice that on the affidavit of Bertram D. Moll dated July 12, 1956 and the exhibits thereto the undersigned will move this Court at a motion part thereof on the 18th day of July, 1956, at 10:30 A. M., or as soon thereafter as counsel can be heard, in the United States Court House for the Eastern District of New York, 271 Washington Street, Brooklyn, New York, for an order, supplemental to the order dated February 17, 1950 made herein, specifically enjoining Ennis M. Nichols, the Common Stockholders Committee and Harold G. Aron from taking further proceedings based on the allegations of their complaints in *Nichols* v. *Long Island Lighting Co.* (E. D. N. Y. No. 13054) and *Nichols* v. *Alker* (E. D. N. Y. No. 14890) against Long Island Lighting Company and

certain individuals who are more fully described in said affidavit.

Dated: Mineola, New York,
July 12, 1956.

Yours, etc.,

DAVID K. KADANE,
Attorney for Long Island Lighting Co.,
and Barrett, Fraser, Hausman, Blakeslee,
Carpenter, Coe, Doebler, Link, Olmsted,
Crummey, Hagerty, Booth, Tegen, Koons,
Miles, Langley, Elbert and Pro Se,
250 Old Country Road,
Mineola, New York.

WINTHROP, STIMSON, PUTNAM AND ROBERTS,
Attorneys for Marks,
40 Wall Street,
New York, New York.

CHARLES C. LOCKWOOD,
Attorney for Vanneck,
30 Pine Street,
New York, New York.

PERCIVAL E. JACKSON,
Pro Se,
68 William Street,
New York, New York.

Exhibit C

(Affidavit of Bertram D. Moll)

STATE OF NEW YORK }
COUNTY OF NASSAU } *SS.:*

BERTRAM D. MOLL, being duly sworn, says:

1. I am an attorney associated with David K. Kadane, attorney for Long Island Lighting Company and for eighteen of the persons named as defendants in an action entitled *Nichols* v. *Alker* (E. D. N. Y. No. 14890) which has been dismissed as *res judicata* and stricken as sham 126 F. Supp. 679 (Judge Galston), *aff'd.*, 231 F. 2d 68, *petition for certiorari pending*, and which action is more fully described hereinafter. I am fully familiar with the facts set out in this affidavit submitted in support of a motion by the Company and the said eighteen persons, and by John Vanneck (represented by Charles C. Lockwood, Esq.), by Laurence M. Marks (represented by Winthrop, Stimson, Putnam and Roberts, Esq.) and by Percival E. Jackson, Esq., *pro se* for an injunction order supplemental to the order dated February 17, 1950 made herein, to enjoin Ennis M. Nichols and the Common Stockholders Committee of Long Island Lighting Company, and their counsel, Harold G. Aron, from the institution of any further proceedings based on the allegations of their complaints in *Nichols* v. *Alker*, *supra*, and *Nichols* v. *Long Island Lighting Co.*, 207 F. 2d 931; 211 F. 2d 392, *cert. denied* 348 U. S. 827, *rehearing denied*, 348 U. S. 884. These complaints allege that said individual moving parties participated directly or indirectly, in the above-captioned reorganization proceedings. The relief requested hereby was suggested by the Court of Appeals as a means of stopping further proceedings based on those complaints, 231 F. 2d at pp. 79, 80, and is made necessary by steps taken by Messrs. Nichols and Aron in this Court, purportedly in *Nichols* v. *Alker*, subsequent to that decision.

Exhibit C

2. The instant proceedings were for the enforcement of a plan of reorganization of Long Island Lighting Company under the provisions of the Public Utility Holding Company Act of 1935. Enforcement was granted, 89 F. Supp. 513 (Judge Kennedy), *aff'd. sub nom. Common Stockholders Committee* v. *S. E. C.*, 183 F. 2d 45, *cert. denied*, 340 U. S. 834, over opposition by Mr. Nichols and his Common Stockholders Committee, represented by Mr. Aron, who unsuccessfully charged that the S. E. C. lacked jurisdiction over the reorganization; that the Company's prospective earnings had been understated; that accrued depreciation had been overstated; that the Common Stockholders had been oppressed by being denied the right to hold a meeting or to solicit funds; and by having been granted only a "limited participation in the proceedings"; and that an offer to sell the Company securities to Consolidated Edison Company of New York at an inadequate price had been considered.

Mr. Nichols and his group further charged that the reorganization was a "scheme" foisted upon the common stockholders by a "management cabal" and illustrates the truth of the adage "What a tangled web we weave when first we practice to deceive!" Brief of Common Stockholders Committee herein dated December 8, 1949 at pp. III, X, XI.

3. In the spring of 1952 Mr. Nichols, on his own behalf and purportedly on behalf of the Common Stockholders Committee, and again represented by Mr. Aron, petitioned the Court of Appeals to reopen this reorganization on the ground of fraud, and this petition was denied on the merits, *Matter of Long Island Lighting Co.*, 197 F. 2d 709 (Judges Swan, Chase and Clark).

4. In the fall of 1952 Mr. Nichols, individually, as a representative of other stockholders of the Company similarly situated, and for the Common Stockholders Committee sued the Company for $27,500,000, alleging that the

reorganization had been fraudulently procured, and in support of his conclusion showed the same matter relating to stockholder oppression, earnings, depreciation, S. E. C. jurisdiction and the Consolidated Edison offer. Judge Inch dismissed this action as a forbidden collateral attack on the reorganization decree, but the order of dismissal, until its subsequent modification, was without prejudice to proceedings Mr. Nichols might desire to undertake herein based on the allegations of his complaint. The Court of Appeals (Judges L. Hand, A. N. Hand and Swan) affirmed for the reason given by Judge Inch, and also because the action was *res judicata*. 207 F. 2d 931. The Court stated:

> "* * * the defendant argues that the proceedings in this court in review of the consolidation plan act as a complete bar to the plaintiffs' claim here. We agree with this argument. The plaintiffs strenuously opposed the approval of the plan in those proceedings and at that time presented most of the claims made here. They have not presented us with any new claims of fraud that were not known at the time of our decision on the motion to reopen the order in 1952. 197 F. 2d 709. While the claims made here may sound in tort they are really the same claims heretofore litigated and determined by us against the plaintiffs.
>
> "For the foregoing reasons we affirm the order of dismissal both because our prior decisions are *res judicata* and as such a bar to the present action, and also because collateral attack upon a judgment already rendered is not in our opinion permissible. *Furthermore we see no reason under the circumstances why the plaintiffs should be allowed to proceed further on a direct attack against the consolidation decree on the basis of the claims before us because they have been passed on before*" (emphasis added; p. 934).

Exhibit C

Following this decision, and completely ignoring its plain language, Mr. Nichols moved in the District Court for an order compelling the Commissioners of the S. E. C. to come to New York to review testimony he proposed to adduce in support of his complaint in *Nichols* v. *Long Island Lighting Co.* This was the first of three occasions upon which he has ignored affirmances by the Court of Appeals of dismissals of his complaints and has sought to have the District Court proceed as though there had been no dismissals. Judge Inch dismissed that motion because no action was pending. Opinion dated December 24, 1953. Mr. Nichols then asked the Court of Appeals to clarify its earlier opinion, and the Court of Appeals reaffirmed its earlier determination, stating:

> "* * * we found that the claims presented were not new but had been passed on before or were known at the time of previous attacks on the decree. See, In re Long Island Lighting Co., 2 Cir., 197 F. 2d 709. Thus the plaintiffs should have been barred from proceeding further on the basis of the allegations presented in the complaint. However, Judge Inch's order dismissing the action contained the following clause: 'without prejudice to any further proceedings which the plaintiffs herein may desire to undertake, pursuant to this Court's reserved jurisdiction in said Civil Action No. 10,413, to vacate or modify the order in the aforesaid action by reason of the allegations set forth in the *complaint herein.*' In view of our further finding of *res judicata* this clause should have been stricken out. Accordingly, we modify our former decision by striking out the above clause, and as modified we affirm the order dismissing the action below." 211 F. 2d 392, 393.

Mr. Nichols' petition for certiorari was denied, 348 U. S. 827, as was his request for rehearing 348 U. S. 884.

6. Notwithstanding these plain statements by the Court of Appeals Mr. Nichols then instituted the action *Nichols* v. *Alker* (E. D. N. Y. No. 14890). His complaint set forth the identical matter which the Court of Appeals had previously held to be *res judicata* in *Nichols* v. *Long Island Lighting Co.*, and certain additional allegations which were found to be sham by Judge Galston. Accordingly, Judge Galston dismissed the complaint as *res judicata* and struck it as a sham. 126 F. Supp. 679. The Court of Appeals (Judges Waterman, Hincks and Frank) unanimously affirmed, 231 F. 2d 68, since the issues tendered by Mr. Nichols therein had previously been tendered by him in the instant proceedings and in his later unsuccessful attempt to reopen these proceedings on the ground of fraud. In addition, and as the main basis for their affirmance, Judges Waterman and Hincks held that the maintenance of said action constituted a forbidden collateral attack on the decree made herein. They stated that:

> "* * * through the device of an apparently independent tort action the plaintiffs below may not bypass the Commission and the enforcement court in an effort to alleviate their treatment under the plan approved by the reorganization decree." 231 F. 2d at p. 79.

7. The Court of Appeals also plainly stated:

> "* * * Further, we think it proper to suggest that if the plaintiffs, unless they can show further justification than that shown in their present complaints and in those heretofore dismissed, should make yet another motion for reopening to the enforcement court, an order of denial be entered accompanied by an appropriate injunctive order directed to counsel as well as to plaintiffs restraining further liti-

gation against the reorganized company and those individuals who directly or indirectly participated in its reorganization." 231 F. 2d at pp. 79, 80.

8. Mr. Nichols petitioned for rehearing, but rehearing was denied (March 13, 1956) following which Mr. Nichols moved in the Court of Appeals for an order:

> "1. Directing these defendants to answer the allegations of the complaint herein.
>
> 2. Directing the United States District Court for the Eastern District Court of New York, with all covenient speed, after the filing of said answers, to proceed with trial by jury of the issues presented by the pleadings."

This was the second time in these litigations that Mr. Nichols has ignored the dismissal of his complaint. The Court of Appeals treated this motion as a second petition for rehearing and denied it on June 7, 1956, stating:

> "* * * In our opinion of February 14, 1956, 231 F. 2d 68, we left it open to appellants, if so advised, to apply under Rule 60(b) to the enforcement court, the U. S. District Court for the Eastern District of New York, to reopen on the ground of after-discovered evidence of fraud. In order to succeed in reopening the reorganization proceeding, appellants must satisfy the trial court that they now have substantial evidence of fraud which was not obtainable by due diligence in time to present it, either in the original reorganization proceedings or in the subsequent petition filed in 1952, to reopen the reorganization proceedings; and that the petition attempting to reopen is made within 'a reasonable time' as required by Rule 60. We indicated that if such

effort was made and denied, the District Court might then consider the appropriateness of enjoining further litigation. 231 F. 2d 68, 79-80. We adhere to these views. Appellees' motion for an injunction against further proceedings based on the allegations of the complaint herein is therefore denied."

Mr. Nichols has since petitioned the Supreme Court for a writ of certiorari to review this decision.

9. Notwithstanding the pendency of his petition for certiorari and the plain and often repeated statements of the Court of Appeals that litigation based on his complaints in the cases previously described should be ended, and the striking of his complaint in *Nichols* v. *Alker* as sham, Mr. Nichols, once again represented by Mr. Aron has moved, purportedly in that case, that the District Court proceed to the trial of the issues of fraud and conspiracy set forth in that complaint. This marks the third time Mr. Nichols has ignored a dismissal of his complaint. A copy of that motion, which seeks also the issuance of process to compel the presence for examination of some twenty-four individuals and the production of records of Long Island Lighting Co., of Consolidated Edison, of the S. E. C., of the Federal Power Commission and of voluminous correspondence, and which contains other requests obviously calculated to harass, and the petition in support thereof, are annexed hereto as Exhibit A. Mr. Nichols and Mr. Aron, by the making of this motion, have shown a complete disregard for the foregoing judicial pronouncements. Their reallegations in these motion papers of the identical matters held to be *res judicata* and sham, and their attempt to have the District Court entertain their sham complaint, the dismissal of which has been affirmed, justify the conclusion that Mr. Nichols and his attorney intend to pursue their harassments unless restrained.

Exhibit C

10. Moreover, as Mr. Nichols admits, his common shares in the "original Long Island Lighting Company" were "exchanged for stock in the new Company" in 1955 (Petition, p. 1). Accordingly, it is submitted that he is estopped from attacking the reorganization plan. *Re Electric Power and Light Corp.*, 176 F. 2d 687; *Kantor* v. *American & Foreign Power Co.*, 197 F. 2d 307. Apparently to avoid the effect of these cases Mr. Nichols tries to show that he was coerced into making the exchange by relating advice from some unnamed person that "accrued dividends would be cancelled unless he then made the exchange" (Petition, p. 1). Such advice, if given, was false. The exchange of old shares for the new shares provided by the reorganization plan and the accrued dividends on such new shares can be made anytime until early in 1960.

Furthermore, Mr. Nichols conceals from this Court that he no longer is a record holder of any common stock of Long Island Lighting Company, nor has he been such a record holder at any time since May 21, 1956 (see affidavit of J. E. Bull dated July 11, 1956, which is annexed hereto as Exhibit B). The full disclosure of his present status would have eliminated any pretense even that this proceeding is brought on behalf of "other stockholders of Long Island Lighting Company similarly situated."

11. Mr. Nichols' claim that he has been acting as a representative of common stockholders by reason of proxies in his possession which "have never been revoked as far as * * * [he] know[s]" (Petition, p. 3) has been held to be baseless by Judge Galston, 126 F. Supp. at p. 684. Nevertheless, the same claim is repeated here. Furthermore, although there were 3,000,000 shares of common stock held of record by 7,574 persons just prior to the reorganization, there were, as of June 30, 1956, only 17,488

shares of this old common stock outstanding in the hands of 192 persons. It is therefore apparent that the overwhelming majority of such holders have signified their acceptance of the reorganization.

12. To the best of deponent's knowledge and belief, the continuing harassment against the reorganized Company and those who are alleged to have participated directly or indirectly in its reorganization are being waged by just one disgruntled person, Mr. Nichols, of the 7,574 persons who were common stockholders at the time of the reorganization, and by one attorney, Mr. Aron, who apparently still smarts at the characterization by the Court of Appeals, 211 F. 2d at pp. 414-416, of his efforts on behalf of the common stockholders during the reorganization (Petition, p. 3).

WHEREFORE, it is respectfully requested that an order supplemental to the order dated February 17, 1950 herein be made specifically enjoining Ennis M. Nichols, the Common Stockholders Committee and Harold G. Aron from taking any further proceedings against the moving parties by reason of the allegations set forth in the complaints in *Nichols* v. *Long Island Lighting Co.* (E. D. N. Y. No. 13054) and *Nichols* v. *Alker* (E. D. N. Y. No. 14890).

/s/ BERTRAM D. MOLL.

Sworn to before this
12th day of July, 1956.

AUGUST SCHAEFER
Notary Public, State of New York
Qualified in Kings County
No. 24-8784900
Term Expires March 30, 1958

Exhibit C

(EXHIBIT A)

This exhibit was not attached to the motion papers served on the attorney for the petitioners, but presumably from the context of the affidavit, it is identic with Exhibit B, printed herein at pages 31 to 32.

(EXHIBIT B)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

J. E. BULL, being duly sworn, says:

1. I am an Assistant Vice-President of City Bank Farmers Trust Company, the transfer agent for the Common Stock of Long Island Lighting Company, and am in charge of the transfer records relating to such stock.

2. These records show that certificates of deposit for Common Stock of Long Island Lighting Company in the name of Ennis M. Nichols, 3060 16th Street, N. W., Apartment 79, Washington 9, D. C., were issued and cancelled as follows:

Certificate Nos.	*Shares*	*Date Issued*	*Date Cancelled*
CDC 74191	250	6/8/48	7/1/55
CDC 74234	500	6/9/48	7/1/55
CDC 74266	25	6/11/48	7/1/55

3. The records further show that the above listed certificates of deposit were surrendered in exchange for the issuance to him of shares of the Common Stock of Long Island Lighting Company provided by the reorganization

plan of that Company, which latter shares were later cancelled, as follows:

Certificate No.	*Shares*	*Date Issued*	*Date Cancelled*
106024	46	7/1/55	5/21/56

At the time of the issuance of said latter shares Mr. Nichols received a check in the amount of $231.19 representing accrued dividends and the proceeds of the sale of certain subscription rights.

4. At the present time Mr. Nichols is not a holder of record of any shares of Common Stock of Long Island Lighting Company, nor has he been such a record holder at any time since May 21, 1956

J. E. Bull.

Sworn to before me this
12th day of July, 1956.

August Schaefer
Notary Public, State of New York
Qualified in Kings County
No. 24-8784900
Term Expires March 30, 1958

Exhibit D

(Letter of August 9, 1956)

August 9, 1956

Hon. Matthew T. Abruzzo
United States District Court
Washington Street
Brooklyn, New York

My dear Judge Abruzzo:

In re: NICHOLS vs. ALKER—CIVIL ACTION 10413

I was informed yesterday, in reply to my inquiry, by Mr. Berkowitz that the papers in the above matter on the motions argued before you on July 25, have been delivered by the Clerk to your Chambers, but contain no memorandum from defendants' counsel who, on the hearing, asked and were given two weeks to serve and file such memoranda.

Any delay of decision occasioned by the defendants or for any other cause will substantially obstruct justice and impair the plaintiffs' rights, for the following reasons:

1. The last decision of the Court of Appeals, pursuant to which our instant motion is made, had not been published or brought to my attention when the pending petition for certiorari was filed in the United States Supreme Court. Hence, I am under the duty of forthwith filing in that Court, a supplemental appendix and brief in which necessarily existence of the decision, the motions made under it and awaiting your decision must be alluded to and described.

Exhibit D

2. To delay or postpone determination of the pending motions, until the Supreme Court has acted will probably mean a delay of four or five months *after argument* and leave an incomplete and inadequate record before the United States Supreme Court when it reconvenes and takes under consideration our Petition for Certiorari.

3. By the artifice of delay and the vicissitudes attendant thereon, these defendants may again completely escape examination, under oath or otherwise, as they have succeeded in doing in this Court since November 1952, even to the point of not answering a verified complaint.

On behalf of the plaintiffs, I most respectfully ask prompt decision of the pending motions, in order to frustrate the obvious intent and purpose of defendant's counsel to wait hopefully that the law of averages as it has applied to petitions for certiorari will work in their favor in the Supreme Court by automatically ending this litigation, which the Court of Appeals has as recently as June 7th of this year again refused to enjoin.

Respectfully submitted,

HAROLD G. ARON
Attorney for Plaintiffs

Copies to:

David K. Kadane, Esq.
Percival E. Jackson, Esq.
Charles C. Lockwood, Esq.
Winthrop, Stimson, Putnam and
Roberts, Esqs.

HGA/RA